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112
No. 2451

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALAMO CATTLE COMPANY, Sociedad Anonima,
a Corporation,

Plaintiff in Error,

vs.

JOHN G. HALL,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

Filed

AUG 13 1914

F. D. Monckton,
Clerk.

No. 2451

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALAMO CATTLE COMPANY, Sociedad Anonima,
a Corporation,

Plaintiff in Error,

VS.

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Upon Writ of Error to the United States District Court
of the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

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Attorneys for Plaintiff,

WILLIAM M. SEABURY, Phoenix, Arizona,
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Attorneys for Defendant.

*In the District Court of the United States of
America, in and for the District of Arizona.*

No. 112—LAW.

JAMES G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

Complaint.

Comes now James G. Hall, by Messrs. Charles R. Loomis, Fred C. Knollenberg, George J. Stoneman and Reese M. Ling, his attorneys, and complaining of The Alamo Cattle Co., Sociedad Anonima, defendants above named, respectfully alleges and shows unto this Honorable Court:

I.

That at all times hereinafter mentioned, plaintiff was and now is a citizen of Colorado; that at all times hereinafter mentioned, defendant The Alamo Cattle Co., Sociedad Anonima, was and now is a

2 *Alamo Cattle Company, Sociedad Anonima,*
corporation, created, organized and existing under
and by virtue of the laws of the Republic of Mexico.

II.

That said defendant corporation on the 16th day of January, A. D. 1913, and for a long time prior thereto, had been and now is engaged in the business of raising and buying cattle at Magdalena, State of Sonora, Republic of Mexico, and in contracting for the sale of said cattle and selling said cattle at Nogales, Naco and Douglas, all being points within the State of Arizona; and [1*] plaintiff further alleges that on the 16th day of January, A. D. 1913, and for a long time prior thereto, said defendant corporation had been and now is represented in the conduct and transaction of its business in which it was so engaged in the selling and delivery of cattle in the State of Arizona, by one W. Beckford Kibbey, Jr., its President and one Elias, whose Christian name is to this plaintiff unknown and at the time of the filing of this complaint cannot be ascertained by him; the said Elias (as plaintiff is informed and believes and upon such information and belief alleges) is the Secretary of said defendant corporation.

III.

Plaintiff avers and alleges that the cause of action hereinafter in this complaint set forth is a cause of action where the matter in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, and is a suit between James G. Hall, plaintiff above named, a citizen of the

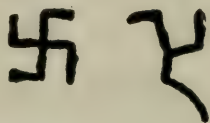
*Page number appearing at foot of page of original certified Record.

State of Colorado and The Alamo Cattle Co., Sociedad Anonima, an alien corporation and citizen of the Republic of Mexico, engaged in and doing business in the State of Arizona, and E. W. Myers, hereinafter in this complaint mentioned was on the 16th day of January, A. D. 1913, and on the 4th day of February, A. D. 1913, a citizen of the State of Texas; and plaintiff further avers and alleges that on the said 16th day of January, A. D. 1913, and 4th day of February, A. D. 1913, the said E. W. Myers, hereinafter in this complaint named as the assignor of a certain contract hereinafter mentioned, might have prosecuted in his own name in this court, this cause of action upon said contract to recover thereon, if no assignment thereof has been made to plaintiff.

IV.

Plaintiff further avers and alleges that on the 16th [2] day of January, A. D. 1913, The Alamo Cattle Co., Sociedad Anonima, defendant above named, at the town of Nogales, State of Arizona, entered into a certain written contract and agreement with one E. W. Myers, of the city of El Paso, State of Texas, under and by the terms of which the said The Alamo Cattle Co., Sociedad Anonima, agreed to deliver to the said E. W. Myers not less than four thousand (4,000) nor more than five thousand (5,000) head of two year old steers, and one thousand (1,000) head of four year old steers; said cattle to be by said defendant delivered f. o. b. on cars at Nogales in the State of Arizona, all duties and expenses thereon to be paid by defendant. That under the terms of said contract it was stipulated and agreed that all of said

cattle were to be delivered in train-load lots during the months of April and May, A. D. 1913, all thereof

to be branded as follows:  That the

said E. W. Myers should furnish cars, and that all of said cattle should be of a grade as good or better than a grade of cattle running in the Republic of Mexico, known as the "Terrasas Cattle," and that defendant should permit the said E. W. Myers the privilege of cutting out and rejecting fifteen (15%) per cent of all of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, or unmerchantable cattle had been cut out by said defendant.

It was further specified, understood and agreed in said contract that upon the delivery by defendant to the said E. W. Myers of said cattle, of the grade, brand, kind and quality, and under the conditions and in the numbers hereinabove mentioned during the months of April and May, A. D. 1913, the said E. W. Myers should, subject to the conditions and reservations hereinafter set forth, pay to the said defendant, through its agents, W. Beckford Kibbey, Jr., and Elias, or either of them, the sum of Twenty-three (\$23.00) Dollars per head, United States currency, for all two year old steers and the sum of Twenty-eight (\$28.00) Dollars per head, United States currency, for all four year old steers; that under the further terms of said contract the defendant acknowledged receipt [3] from the said E. W. Myers of the sum of Ten Thousand (\$10,000.00) Dollars, which sum, under the terms of said contract,

should be and was understood and agreed to be a partial payment on the total price to be paid for said cattle, and further said Myers agreed to pay the balance of the purchase money to be paid for said cattle so to be delivered, when said cattle of the grade and under the terms, conditions and descriptions hereinabove mentioned should be delivered on board of the cars, failing so to do, the said E. W. Myers should forfeit the sum of Ten Thousand (\$10,000.00) Dollars and any further amount or amounts advanced under the terms of said contract.

And plaintiff further alleges that it was further stipulated, understood and agreed by the terms of said contract that in the event defendant should fail to deliver the cattle so by it agreed to be delivered of the grade, brand and description and in the numbers, and at the times mentioned in said contract, then and in that event defendant should pay to the said E. W. Myers the sum of Two (\$2.00) Dollars per head for all of said cattle which it should fail so to deliver, and in addition thereto, should return the sum of Ten Thousand (\$10,000.00) Dollars, and any further sum or sums of money paid and advanced by the said E. W. Myers as a forfeit and in liquidated damages to be paid to the said E. W. Myers for the failure on the part of defendant to perform the conditions of said contract, a copy of which contract is hereto attached and marked Exhibit "A" and made a part of this complaint.

Plaintiff alleges that said contract was executed between the parties thereto on the 16th day of January, A. D. 1913, and that on said date the said E. W.

Myers then and there paid to W. Beckford Kibbey, Jr., then and there the president and authorized agent of defendant corporation, the sum of Ten Thousand (\$10,000.00) Dollars so in said contract provided to be by him paid.

V.

Plaintiff alleges that said contract was and is an [4] assignable chose in action and that on the 4th day of February, A. D. 1913, for a good and valuable consideration theretofore paid by plaintiff to the said E. W. Myers, the said E. W. Myers sold, assigned, transferred and set over unto plaintiff said contract hereinabove referred to as Exhibit "A," and all the rights and interests therein held by the said E. W. Myers, including any and all claims for damages and rights of actions against plaintiff, arising under the terms of said contract, and that plaintiff on the 4th day of February, 1913, and ever since said date has been and now is the owner and holder by assignment as aforesaid of all rights, claims and causes of action which have accrued or might have accrued to the said E. W. Myers as against defendant under the terms of said contract.

VI.

Plaintiff alleges that at all times during the months of April and May, A. D. 1913, he was ready, willing and able to comply with and did comply with, the terms and conditions of said contract to be by him performed thereunder, and that at all times during said months up to the 13th day of May, A. D. 1913, upon which said date plaintiff was notified by defendant that it would not perform the terms of

said contract on its part to be performed, plaintiff was at the town of Nogales in the State of Arizona, ready, willing and able to receive said cattle from defendant in the numbers and of the grade, brand, kind and character mentioned in said contract, but that defendant notwithstanding failed, neglected and refused to deliver to plaintiff said cattle in the numbers, and of the grade, brand, kind and character required by it to be delivered under the terms of said contract, and on the 13th day of May, A. D. 1913, notified plaintiff in writing that it would not make any delivery to him of cattle other than the cattle of the kind, brand, character and numbers theretofore tendered by defendant to plaintiff; which [5] said cattle so by defendant tendered to plaintiff for delivery plaintiff alleges were not of the kind, brand, character, or quality, or grade, or numbers required by it to be delivered in this, to wit: That said cattle so tendered for delivery were not cattle tendered in train-load lots as good or better than the "Terrasas cattle," or of the grade, kind, character, brand or numbers required under the terms of said contract to be by defendant delivered in train-load lots at Nogales, in the State of Arizona.

VII.

Plaintiff alleges that upon the failure on the part of defendant to comply with the terms of said contract and to perform the conditions thereof required thereunder by it to be performed, and prior to the commencement of this action, he demanded from defendants the return to him of the sum of Ten Thousand (\$10,000.00) Dollars heretofore by defend-

ant received from the said E. W. Myers as a part payment on the purchase price of said cattle and also demanded from defendant the sum of Two (\$2.00) Dollars per head on four thousand (4,000) head of two year old steers and one thousand (1,000) head of four year old steers, making a total of the further sum of Ten Thousand (\$10,000.00) Dollars, which sums of money, in the aggregate of Twenty Thousand (\$20,000.00) Dollars, plaintiff alleges became due and now is due from defendant to plaintiff under the terms of said contract on account of the failure and refusal of defendant to perform the conditions thereof, as hereinabove set forth, but that defendant refused and still does refuse to pay to plaintiff said sum of Twenty Thousand (\$20,000.00) Dollars or any part thereof; whereby plaintiff was and is damaged in the sum of Twenty Thousand (\$20,000.00) Dollars, and plaintiff alleges that on account of the failure, refusal and neglect on the part of defendant to perform [6] the conditions of said contract, he has been and now is damaged in the sum of Twenty Thousand (\$20,000.00) Dollars.

VIII.

Plaintiff alleges that defendant corporation is a foreign corporation engaged in business in the State of Arizona and that said defendant has failed, neglected and refused to appoint a statutory agent upon whom service of writs and process may be had as required by the laws of the State of Arizona.

WHEREFORE, plaintiff prays judgment against defendant for the sum of Twenty Thousand (\$20,000.00) Dollars, together with interest thereon

from February 13th, A. D. 1913, and costs of this suit.

(Signed) CHAS. R. LOOMIS,
FRED C. KNOLLENBERG,
GEORGE J. STONEMAN,
REESE M. LING,

Attorneys for Plaintiff. [7]

Exhibit "A" [to Complaint—Contract for Sale and Purchase of Cattle, Dated January 16, 1913, Alamo Cattle Co., etc., and E. W. Myers].

CONTRACT FOR SALE AND PURCHASE OF CATTLE.

This agreement made and entered into this 16th day of January, 1913, between THE ALAMO CATTLE CO., S. A., of Magdalena, Sonora, Mexico, hereinafter known as the seller, and Mr. E. W. Myers of El Paso, Texas, hereinafter known as the buyer, witnesseth as follows:

For and in consideration of the sum of:

(Twenty Three) Dollars U. S. Cy. for two year old steers,

(Twenty eight) Dollars U. S. Cy. for four year old steers

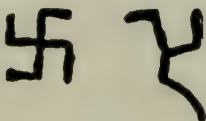
——— Dollars U. S. Cy. for ———

——— Dollars U. S. Cy. for ———

the seller agrees to sell and deliver F. O. B. cars at Nogales, Ariz., station, all duties and expenses paid; buyer to furnish cars four thousand to five thousand head of two year old steers and one thousand head of four year old steers as good or better than the Terrasas cattle. Payment of these cattle is to be guaranteed in a manner satisfactory to the First

10 *Alamo Cattle Company, Sociedad Anonima,*
National Bank of Nogales, Ariz., before each shipment crosses the line all to be of full ages at time of delivery.

The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle have been cut out by the seller.

Cattle to be branded  .

The seller hereby acknowledges receipt of (Ten Thousand) Dollars U. S. Cy. in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so he shall forfeit the amount or amounts advanced on this contract. The seller [8] agrees to pay two dollars, in addition returning the forfeit, on each head he fails to deliver under this contract which shall constitute entire claim for damages. Cattle to be cut Moraga or Destiladera, buyer to give fifteen day's notice for each delivery in train-load lots during April and May, 1913.

Witness our hands this 16th day of January, 1913.

ED. W. MYERS,

ALAMO CATTLE CO.,

W. BECKFORD KIBBEY, Jr., Prest. [9]

[Exhibit "A" to Complaint—Contract for Purchase and Sale of Cattle, Dated January 16, 1913, Ed. W. Myers and J. G. Hall and K. D. Oliver.]

**CONTRACT FOR THE PURCHASE AND SALE
OF CATTLE.**

WHEREAS, on or about the 16th day of January, 1913, Ed. W. Myers, of El Paso, Texas, did enter into a contract to purchase four to five thousand (4,000 to 5,000) head of two year old steers, and one thousand (1,000) head of four year old steers as good or better than the Terrasas cattle, from The Alamo Cattle Company, S. A., of Magdalena, Sonora, Mexico; which cattle are to be delivered at Nogales, Arizona, all duties and expenses paid; a copy of which original contract is hereto attached and made a part hereof, and marked Exhibit "A," to which reference is hereby made for a more complete description, terms, and conditions and:

WHEREAS, the said Ed. W. Myers is desirous of selling said contract to J. G. Hall, and J. G. Hall is desirous of purchasing said contract and cattle from and through the said Ed. W. Myers.

NOW THEREFORE WITNESSETH that for and in consideration of the sum of Ten Thousand (\$10,000.00) Dollars advance money which has previously been paid by the said Ed. W. Myers to the said Alamo Cattle Company, the receipt of which is hereby confessed and acknowledged, and further and additional sum of Three Dollars (\$3.00) per head on the two year old steers delivered under said

contract; and Four Dollars (\$4.00) per head on the four year old steers delivered under said contract, the said Ed. W. Myers does hereby sell and assign the aforesaid contract and all rights thereunder to the said J. G. Hall, his successors and assigns.

It is mutually understood and agreed by and between the said Ed. W. Myers and the said J. G. Hall, acting by and through his duly authorized agent and representative K. D. Oliver, that the said Ed. W. Myers is to receive the aforesaid additional consideration of Three Dollars (\$3.00) per head for the two year old [10] steers, and Four Dollars (\$4.00) per head for the four year old steers only in case they are delivered, and in the event there are more than four thousand (4,000) head of two year old steers and more than one thousand (1,000) head of four year old steers, the said J. G. Hall is to pay no additional consideration to the said Ed. W. Myers for such additional number of cattle which may be delivered under the said contract.

It is understood and agreed that J. G. Hall is to pay Ed. W. Myers his bonus on the cattle mentioned in this contract at the time of each and every delivery.

It is also mutually understood and agreed that the said Ed. W. Myers or E. M. Tankersly, his agent, shall be on the ground at the time of delivery of all cattle and aid and assist the said J. G. Hall, his agents or assigns, in receiving said cattle.

IN WITNESS WHEREOF the said Ed. W. Myers, acting in his own proper person, and the said J. G. Hall, acting by and through his duly author-

ized agent and representative, K. D. Oliver, have hereunto set their hands and seals to duplicate originals, this 4th day of February, A. D. 1913.

ED. W. MYERS.

J. G. HALL.

By K. D. OLIVER, (Seal)
Manager.

[Endorsements]: No. 10 (Tucson). #112-Law.
In the District Court of the United States of America, in and for the District of Ariz. James G. Hall, Plaintiff, vs. The Alamo Cattle Co., S. A., Defendant. Complaint. Filed Jan. 19, 1914, at 4:55 P. M. Geo. W. Lewis, Clerk. By Robert E. L. Webb, Deputy. [11]

Summons.

*In the United States District Court for the District
of Arizona.*

No. 112.

JAMES G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

Action Brought in the United States District Court
for the District of Arizona.

The President of the United States of America,
Greeting: To The Alamo Cattle Co., Sociedad
Anonima.

YOU ARE HEREBY SUMMONED AND RE-
QUIRED to appear in an action brought against you

14 *Alamo Cattle Company, Sociedad Anonima,*

by the above-named plaintiff in the United States District Court for the District of Arizona, and answer the complaint filed therein with the Clerk of this said Court, at Phoenix, in said District, within twenty days after service upon you of this Summons, if served in this said District, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default may be taken against you.

Given under my hand and seal of the United States District Court for the District of Arizona, this 19th day of January, 1914.

[Seal]

GEORGE W. LEWIS,
Clerk of Said District Court.

UNITED STATES MARSHAL'S RETURN.

Received this writ Jan. 20, 1914, at Phoenix, Arizona, and executed the same Feb. 27, 1914, at Nogales, Arizona, by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint, to Ramon Elias, personally, the said Ramon Elias at the time being Vice-president of the Alamo Cattle Company.

J. P. DILLON,
U. S. Marshal.
By A. W. Forbes,
Deputy.

[Endorsements]: No. 10 (Tucson). Marshal's Docket No. 379. Filed Mar. 1, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [12]

*In the United States District Court for the District
of Arizona.*

No. 112-LAW.

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Amended Answer.

Comes now the defendant above named and answering the plaintiff's complaint herein, demurs to said complaint upon the ground that the said complaint fails to state facts sufficient to constitute a cause of action.

I.

Further answering the said complaint defendant admits the allegations contained in Paragraph I of said complaint except that it denies any knowledge or information sufficient to form a belief as to whether or not plaintiff was or now is a citizen of the State of Colorado.

II.

Defendant admits the allegations in Paragraph II of said complaint.

III.

Defendant admits the allegations contained in Paragraph III of said complaint except that it denies that it has any knowledge sufficient to form a belief as to whether or not E. W. Myers mentioned in said complaint was on January 16, 1913, and on

February 4, 1913, or at any other time, a citizen of the State of Texas, and denies that it has any knowledge or information sufficient to form a belief as to whether or not the said Myers at the times stated, as the assignor [13] of the certain contract mentioned in said complaint, might or could have prosecuted in his own name in this court the alleged cause of action purported to be set up in said complaint if no alleged assignment thereof had been made to the plaintiff.

IV.

Defendant denies each and every allegation contained in Paragraph IV of said complaint except that defendant admits that it made and executed the certain contract, copy of which is attached to said complaint and marked Exhibit "A," on or about January 16, 1913, between the said defendant and E. W. Myers, and defendant further admits that at or about the time of the execution of said contract, namely, January 16, 1913, the defendant then and there received from the said E. W. Myers the sum of ten thousand (\$10,000.00) Dollars required to be paid to the defendant by the said contract, copy of which is attached to the said complaint herein.

V.

Defendant admits the allegations contained in Paragraph V of said complaint.

VI.

Defendant denies each and every allegation contained in Paragraph VI of said complaint.

VII.

Defendant denies each and every allegation con-

tained in Paragraph VII of said complaint except that defendant admits that it refuses to pay to the plaintiff the sum of Twenty Thousand (\$20,000.00) Dollars, or any part thereof.

VIII.

Defendant admits the allegations contained in Paragraph VIII thereof, but alleges in connection therewith that since the commencement of this action it has been duly authorized to conduct and transact business in the State of [14] Arizona and has duly complied with all of the laws relating to the lawful transaction of business in the State of Arizona by a corporation organized and existing under and pursuant to the laws of the Republic of Mexico, and that since the commencement of this action defendant has had and now maintains an office for the regular transaction of its business at the town of Nogales, in the County of Santa Cruz, and State of Arizona, and has duly appointed a statutory agent qualified to receive the service of process in its behalf.

For a separate defense defendant alleges:

IX.

At all times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico, and that heretofore the said defendant was and now is duly authorized to transact business in the State of Arizona under and pursuant to its laws, and that it has a place for the regular transaction of its said business in the Town of Nogales, in the State of Arizona. And that it has in all re-

spect complied with the laws of the State of Arizona, relating to the lawful transaction of business within the State of Arizona by foreign corporations.

X.

That heretofore on or about January 16, 1913, the defendant made and entered into a contract in writing with one E. W. Myers, which said contract was and is in words and figures following:

“This agreement made and entered into this 16th day of January, 1913, between THE ALAMO CATTLE CO., S. A., of Magdalena, Sonora, Mexico, hereinafter known as the seller and Mr. E. W. Myers of El Paso, Texas, hereinafter known as [15] the buyer, witnesseth as follows:

For and in consideration of the sum of:

(Twenty Three) Dollars U. S. Cy. for two year old steers;

(Twenty Eight) Dollars U. S. Cy. for four year old steers.

..... Dollars U. S. Cy. for

..... Dollars U. S. Cy. for

the seller agrees to sell and deliver F.O.B. cars at Nogales, Arizona, station, all duties and expenses paid; buyer to furnish cars four thousand to five thousand head of two year old steers and one thousand head of four year old steers as good or better than the Terrasas cattle. Payment of these cattle is to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Ariz., before each shipment crosses the line, all to be of full ages at time of delivery.

The seller also agrees to allow the buyer the privi-

lege of cutting out and rejecting fifteen per cent of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle have been cut out by the seller.

Cattle to be branded

The seller hereby acknowledges receipt of (Ten Thousand) Dollars, U. S. Cy., in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so he shall forfeit the amount or amounts advanced in this contract. The seller agrees to pay two dollars, in addition returning the forfeit on each head he fails to deliver under this contract, which shall constitute entire claim for damages. Cattle to be cut Moraga or Destiladera, buyer to give fifteen days' notice for each delivery in train-load lots during April and May, 1913. [16]

Witness our hands this 16th day of January, 1913.

ED. W. MYERS.

ALAMO CATTLE CO.

W. BECKFORD KIBBEY, Jr., Prest."

XI.

On information and belief, defendant alleges that on or about February 4, 1913, the contract between defendant and the said E. W. Myers, dated January 16, 1913, was, for a valid consideration, by the said E. W. Myers duly assigned, transferred and set over unto J. G. Hall, the plaintiff above named, and that thereafter and thereupon the said J. G. Hall assumed and agreed to perform each and all of the terms and conditions of said contract required to be

20 *Alamo Cattle Company, Sociedad Anonima,*
performed by the said E. W. Myers.

XII.

That at all times during the months of April and May, 1913, as required by the terms of said contract between defendant and the said E. W. Myers, dated January 16, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract to be by it performed, and did duly and fully comply with and perform said terms and conditions on its part until the plaintiff refused and failed to perform the terms and conditions of said contract on his part to be performed, as hereinafter more fully set forth.

XIII.

That in the early part of April, 1913, defendant duly tendered to the plaintiff above named and his duly authorized representative one thousand head of cattle of the kind and quality which defendant agreed to furnish by said contract, but notwithstanding plaintiff refused to accept said cattle so tendered at said time; that on or about May 9, 1913, defendant duly tendered to the plaintiff above named and his [17] duly authorized representatives from one thousand *twelve* hundred to one thousand five hundred head of cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of the said contract, and that on or about May 13, 1913, defendant also duly tendered to the plaintiff above named and his duly authorized representatives one thousand and ninety-three head of cattle of the kind and quality which defendant agreed to furnish and sell under

and pursuant to the terms of said contract, but plaintiff, without any right or authority so to do, broke and failed to perform his part of the said contract and refused to select and accept any of the said cattle so offered and tendered by defendant to the said plaintiff, although the said cattle in every respect fulfilled each and all of the terms and conditions of the said contract relating thereto, and that plaintiff further failed to perform said contract in that the said plaintiff had not then and there or thereafter supplied the cars necessary to receive the said cattle at Nogales, Arizona, in accordance with the terms of said contract. And defendant further alleges that plaintiff further failed to perform the said contract in that plaintiff had made no arrangement satisfactory to the First National Bank of Arizona, for the payment of the purchase price of the said cattle in accordance with the terms of the said contract, and that plaintiff has wholly failed and neglected to pay the contract price for said cattle, although payment thereof has been duly demanded, and has wholly failed and neglected to perform the terms and conditions of said contract to be by him performed.

XIV.

Defendant further alleges that at the time defendant entered into said contract with the said Myers, the subject of said contract, namely, the cattle therein specified, and the business connected therewith, was of a speculative character [18] and that the value and price of the cattle therein described and agreed to be furnished by the defend-

ant to the said Myers was and still is of a fluctuating character. That the amount of damage which defendant might and could sustain by reason of a breach of said contract on the part of the said plaintiff and of a failure upon his part to perform the terms thereof was uncertain in amount, and not readily ascertainable or ascertainable at all, and that the said sum of ten thousand (\$10,000.00) Dollars mentioned in said contract was and is a reasonable and usual sum to be fixed upon and paid to the defendant as liquidated damages and not as a penalty or forfeiture for the breach of the said contract upon the part of the said plaintiff.

For a counterclaim against said plaintiff as follows:

XV.

Defendant realleges each and all of the allegations of Paragraphs IX, X, XI, XII and XIII, of the answer herein as if here set forth at length.

XVI.

Defendant further alleges that for the purpose of performing the terms and conditions of said contract to be by it performed, defendant purchased and gathered five thousand heads of cattle of the kind and quality referred to in said contract and was obliged to hold them for delivery to plaintiff under said contract during the months of April and May, 1913, at great expense by reason of the failure of the plaintiff to accept said cattle when tendered as aforesaid; that the cost reasonably and necessarily incurred by the defendant in gathering, driving and holding said cattle as aforesaid was One (\$1.00) Dollar per head,

making the aggregate amount of loss so incurred by defendant Five Thousand (\$5,000.00) Dollars; [19] that during said time, defendant without negligence on its part or on the part of its agents and servants and by reason of defendant being compelled, by plaintiff's failure to accept said cattle when tendered, to drive and hold said cattle for an excessively long period, as aforesaid, lost by death at least two hundred head of said cattle; that the market value of said cattle which so died without export duties and charges thereon was Eighteen (\$18.00) Dollars per head; that the defendant was unable to sell or reap any benefit out of said dead cattle, making the aggregate loss so incurred by defendant three thousand six hundred (\$3,600.00) Dollars; that defendant, though it diligently endeavored to sell said cattle after May 13, 1913, to other parties in order to mitigate the damages herein, was unable to sell two thousand of said head of cattle during said shipping season, which expired on June 20, 1913, when it became too hot to ship cattle, and defendant was obliged to hold said two thousand head of cattle until November, 1913, when it was possible to resume shipping cattle, and the defendant then sold said cattle to parties other than plaintiff at an increase in price of One (\$1.00) Dollar per head over the price stipulated in said contract; that the cost reasonably and necessarily incurred by the defendant in keeping said cattle from May 13, 1913, to November, 1913, was four (\$4.00) Dollars per head; that deducting one (\$1.00) Dollar per head, representing the increase in price obtained by defendant as aforesaid, the aggre-

gate loss thus incurred by defendant was Six Thousand (\$6,000.00) Dollars; that during said time defendant lost by death at least one hundred and fifty head of said cattle without negligence on its part or on the part of its agents and servants; that the market value of said cattle which died without export duties and charges thereon was Eighteen (\$18.00) Dollars per head; that defendant was unable to sell or reap any benefit from said dead cattle, making the aggregate loss so incurred by defendant Two Thousand Seven Hundred (\$2,700.00) Dollars; whereby defendant was and is damaged in the total aggregate [20] sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars, and defendant alleges that on account of the failure, refusal and neglect on the part of plaintiff to perform the conditions of said contract he has been and now is damaged in the sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars, and that defendant has received payment of no part thereof, except the sum of Ten Thousand (\$10,000.00) Dollars heretofore received as aforesaid.

WHEREFORE, defendant demands judgment upon its said demurrer and that plaintiff take nothing from the defendant herein, and that the complaint herein be dismissed with costs, and that defendant obtain judgment against plaintiff on its counterclaim for the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars, together with interest

thereon from December 1, 1913, and costs.

FRANK J. BARRY,

Nogales, Arizona,

WILLIAM M. SEABURY,

Phoenix, Arizona,

Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. James G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Amended Answer. Served with a copy of the within this 22d day of April. George J. Stoneman, Reese M. Ling. Filed April 23, A. D. 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [21]

*In the United States District Court for the District
of Arizona.*

No. 112—LAW.

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Answer to Cross-Complaint.

Comes now James G. Hall and answering the counterclaim and cross-complaint filed by defendant herein and denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and has no means of ascertaining the truth thereof, and for this reason denies the allegations in said cross-complaint

contained, and denies that through any of the acts of plaintiff or through the failure on the part of plaintiff to do or perform any of the acts or things as charged in said counterclaim and cross-complaint, defendant has been damaged in the sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars or any other sum whatsoever, or at all, and denies that plaintiff is indebted to defendant on account of any of the matters or things in said counterclaim and cross-complaint set forth, in the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars or any other sum or at all. [22]

WHEREFORE, plaintiff having answered herein, prays that said counterclaim and cross-complaint be dismissed and the defendant take nothing thereunder.

GEORGE J. STONEMAN,
REESE M. LING,
FRED C. KNOLLENBERG,
CHARLES R. LOOMIS,

Attorneys for Plaintiff.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. James G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Answer to Cross-Complaint. Served with a copy of the within this 1st day of May, 1914. Frank J. Barry, W. M. Seabury, Attorneys for Defendant, by DeRiemer. Filed May 2, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [23]

**[Minutes of Court—May 20, 1914—Order Changing
Name of Plaintiff.]**

*In the District Court of the United States for the
District of Arizona.*

Minute Entry of Wednesday, May 20th, 1914.

No. 10 (TUCSON).

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Upon motion of George J. Stoneman, Esquire,
counsel for the plaintiff herein, it is ordered that the
name of the plaintiff be changed from James G. Hall
to John G. Hall. [24]

[Minutes of Court—May 22, 1914.]

*In the District Court of the United States for the
District of Arizona.*

Minute Entry of Friday, May 22d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

This cause coming on this day regularly for trial,
the plaintiff being present in person and with his

28 *Alamo Cattle Company, Sociedad Anonima,*
counsel, F. C. Knollenberg, Esquire, Charles R. Loomis, Esquire, George J. Stoneman, Esquire, and Reese M. Ling, Esquire, and the defendant being represented by its counsel, Wm. M. Seabury, Esquire, and Frank J. Barry, Esquire, and both parties announce ready for trial. Whereupon the Clerk was ordered to draw eighteen names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned and not excused, and the names of eighteen persons were thereupon drawn, and all answering thereto respectively, took their places in the jury-box. The said jurors were then sworn and examined on their *voir dire*. Guy Brooks was challenged by the plaintiff for cause, and excused by the Court, and thereupon C. S. McHenry was called, sworn and examined on his *voir dire*. The panel being now full and complete and said jurors in the jury-box having been passed for cause by both the prosecution and the defense, the respective parties exercise their right of peremptory challenge and the following named jurors were called according to law to constitute the jury, viz.: Gustav H. Schneider, S. M. Warner, Richard Starr, W. G. Powers, Don Blankenship, Gus Hoff, G. W. Pittock, A. Shapard, W. B. Dolan, J. F. Kellner, H. F. [25] Schurrer, Paul Bengsch, who were duly sworn to well and truly try the issues joined between John G. Hall, the plaintiff herein, and the Alamo Cattle Company, the defendant herein. W. B. Van Vreen, Raymond Allee, and Maynard Frazier were duly sworn as Court reporters herein. And this being the regular time for an adjournment of this court, the Court duly

admonished the jury and excused them from further attendance upon this Court until Saturday, the 23d day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. [26]

**[Minutes of Court—May 23, 1914—Order Overruling
Demurrer.]**

*In the District Court of the United States for the
District of Arizona.*

Minute Entry of May 23d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

The defendant having heretofore filed a demurrer herein, and said demurrer not having been urged, or being now urged by the defendant, it is ORDERED that the same be and it is hereby overruled. [27]

[Minutes of Court—May 23, 1914.]

*In the United States District Court for the District
of Arizona.*

Minute Entry of Saturday, May 23d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

This case having been continued from Friday, May 22d, 1914, come now the same parties hereto, and come also the jurors herein, their names are called, and all answering thereto respectively, the further trial of this case proceeds as follows: The pleadings herein were then read aloud to the jury by the respective counsel, and short statements made of the issues to be tried herein. Counsel for the plaintiff then moved to amend his complaint by striking out the word "car" on page six, paragraph 6, line thirty-three, and inserting in lieu thereof the word "train," and by inserting before the word "with" on page six, paragraph six, line nine, the following words: "and did comply," and defendant consenting thereto, it is accordingly so done. The plaintiff then moved the Court to place the witnesses under the rule, and it is ordered that all witnesses now present, with the exception of John G. Hall, witness for the plaintiff, and J. Beckford Kibbey, Jr., and Ramon Elias, witnesses for the defendant, be called and placed under the

rule, and thereupon T. J. Donahue and A. M. Joffroy were called as witnesses for the defendant, sworn, and placed under the rule. The plaintiff then to maintain upon his part the issues herein called as witness John G. Hall, who was duly sworn and examined in part, and offered in evidence ten exhibits, Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I" and "J," which were admitted in evidence and ordered filed, and this being the regular time for the adjournment of this Court the Court duly admonished the jury, and excused them from further service in this case until Tuesday, the 26th day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. It is further ordered that all witnesses in this case be excused until Tuesday, May 26th, 1914, at ten o'clock A. M. [28]

[Plaintiff's Exhibit "C"—Letter Dated April 25, 1913, Alamo Cattle Co., S. A., to K. D. Oliver.]

W. BECKFORD KIBBEY, Jr.,
President.

RAMON ELIAS,
General Manager.

ALAMO CATTLE CO., S. A.

Magdalena, Sonora, Mexico.

Box 24.

HACIENDA EL ALAMO,

Nogales, Ariz., April 25, 1913.

Mr. K. D. Oliver,

304 American Bank Bldg.,

El Paso, Texas.

My dear Mr. Oliver:

Received your letter of the 21st on my return from Hermosillo yesterday.

32 *Alamo Cattle Company, Sociedad Anonima,*

Ramon left for the Altar, to endeavor to get a herd turned loose by one of our agents some two weeks ago, and I leave for the Alamo this afternoon.

I will round up everything at once, and move the two year old steers to Destiladero, where they will be ready to cut about the 8th. I have ordered cars, advising them that the order is part of your blanket order. We will expect you here the morning of May 8th, unless you receive further advice from us. Will advise you about how many we can deliver as soon as cattle start north. I expect to move them to Destiladero as early as possible, in order to let them have a good rest before loading.

Yours very truly,

ALAMO CATTLE COMPANY, S. A.

By BECKFORD KIBBEY, Jr.,

Pres.

K:ES.

[Endorsement]: Plff. Exhibit "C." No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 23, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [29]

[Plaintiff's Exhibit "D"—Letter Dated April 28, 1913, Manager to W. B. Kibbey, Jr.]

(Carbon Copy.)

Apr. 28, 1913.

W. B. Kibbey, Jr., Esq.,
c/o First Nat. Bank,
Nogales, Ariz.

Dear Sir:

Your favor of the 25th to hand and contents noted.

Kindly advise us as promptly as possible the number of head of cattle you will have in the first delivery.

I will arrive at Nogales on the train on the morning of the 8th, unless otherwise advised by you of some change in the program.

Should there be any change, please notify me as promptly as possible, as a man from Montana wishes to come down and be present when the cattle are cut, and I do not want to let him start out ahead of time.

Please advise how many cars you ordered from the agent, and their length. I have also written him for this information, as we must have it to keep our files and routine of business straight.

Yours truly,

Manager.

KDO/PBD.

[Endorsed]: Plff. Exhibit "D." Admitted and filed May 23, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. 10. Hall vs. Alamo Cattle Co. [30]

[Plaintiff's Exhibit "E"—Day Lettergram Dated May 3, 1913, K. D. Oliver to Alamo Cattle Co.]

DAY LETTER.

THE WESTERN UNION TELEGRAPH COMPANY.

El Paso, Tex., May 3, 1913.

Alamo Cattle Co.,

c/o First National Bank, Nogales, Ariz.

Unless otherwise instructed I will arrive Nogales

34 *Alamo Cattle Company, Sociedad Anonima,*
on the ninth to cut 2 yr. old steers. As Montana
man coming with me must start several days ahead
of time please answer as to whether conditions favor-
able for getting cattle also how many first shipment
will consist of as must have this information for car
order.

K. D. OLIVER.

Chg. J. G. Hall.

2:45 PM.

[Endorsement]: Plff. Exhibit "E." No. 10. Hall
vs. Alamo Cattle Co. Admitted and filed May 23,
1914. George W. Lewis, Clerk. By Effie D. Botts,
Deputy. [31]

[Plaintiff's Exhibit "F"—Telegram Dated May 3,
1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH COM-
PANY.

RECEIVED AT 107 North Oregon St. El Paso.

Phone 4321. Always Open. 206 GS U 10.

Nogales, Ariz., May 3.

K. D. Oliver,

El Paso, Texas.

Will have at least one train load for the tenth.

ALAMO CATTLE CO.

6:33 PM.

[Endorsement]: Plff. Exhibit "F." No. 10. Hall
vs. Alamo Cattle Co. Admitted and filed May 23,
1914. George W. Lewis, Clerk. By Effie D. Botts,
Deputy. [32]

**[Plaintiff's Exhibit "G"—Day Lettergram, Dated
May 4, 1913, K. D. Oliver to Alamo Cattle Co.]**

DAY LETTER.

**THE WESTERN UNION TELEGRAPH COM-
PANY.**

El Paso, Texas, May 4, 1913.

Alamo Cattle Co.,
Nogales, Arizona.

Will arrive Nogales morning ninth. Please arrange so we can cut cattle that day and load tenth without fail. Wire to-day how many head you will have. This information absolutely necessary to order proper number of cars. Answer promptly.

K. D. OLIVER.

CHG JGHALL.

[Endorsement]: Plff. Exhibit "G." No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 23, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [33]

**[Plaintiff's Exhibit "H"—Day Lettergram Dated
May 5, 1913, Alamo Cattle Co. to K. D. Oliver.]**

DAY LETTER.

**THE WESTERN UNION TELEGRAPH COM-
PANY.**

RECEIVED AT 107 North Oregon St., El Paso.
Phone 4321. Always Open; 17 NS. ZS. 20
BLUE.

NOGALES AZ May 5th, 1913.

K. D. Oliver,
El Paso, Texas.

Will do all possibly can to have cattle ready by the

36 *Alamo Cattle Company, Sociedad Anonima,*
tenth expect to have about fifteen hundred head.

ALAMO CATTLE CO.

1151A. 176.

[Endorsement]: Plff. Exhibit "H." No. 10. Hall
vs. Alamo Cattle Co. Admitted and Filed May 23,
1914. George W. Lewis, Clerk. By Effie D. Botts,
Deputy. [34]

[Plaintiff's Exhibit "I"—Telegram Dated May 7,
1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH
COMPANY.

RECEIVED AT 107 North Oregon St., El Paso.

Phone 4321. Always Open; 283 GS MH 21 X.

Nogales, Az., May 7, 1913.

K. D. Oliver,

El Paso, Texas.

Cattle will be ready to cut at Destiladara morning
of ninth wire if you will be here will order cars an-
swer.

ALAMO CATTLE CO.

733 PM.

Telephone
to Oliver
By S. B.
Time 950.

[Endorsement]: Plff. Exhibit "I." No. 10. Hall
vs. Alamo Cattle Company. Admitted and Filed
May 23, 1914. George W. Lewis, Clerk. By Effie
D. Botts, Deputy. [35]

[Plaintiff's Exhibit "J"—Telegram Dated May 8,
1913, K. D. Oliver to Alamo Cattle Co.]

THE WESTERN UNION TELEGRAPH COM-
PANY,

El Paso, Tex., May 8, 1913.

Alamo Cattle Co.,

Care First National Bank, Nogales, Ariz.

Arrive Nogales morning ninth have ordered cars.

K. D. OLIVER.

Chg. J. G. Hall,

8:50 A. M.

[Endorsement]: Plff. Exhibit "J." No. 10. Hall
vs. Alamo Cattle Co. Admitted and Filed May 23,
1914. George W. Lewis, Clerk. By Effie D. Botts,
Deputy. [36]

[Minutes of Court—May 26, 1914.]

*In the United States District Court for District of
Arizona.*

Minute Entry of Tuesday, May 26th, 1914.

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

This case having been continued from Saturday,
May 23, 1914, come now the same parties hereto and
come also the jurors herein; their names are called
and all answering thereto, respectively, the further
trial of this case proceeds as follows: W. L. Howell,

K. D. Oliver and James A. Johnson were called as witnesses for the plaintiff, sworn and placed under the rule. The plaintiff then, to further maintain upon his part the issues herein, recalled John G. Hall for further examination in chief, and called as witnesses K. D. Oliver and James A. Johnson, who were duly examined and cross-examined, and offered in evidence four exhibits, Exhibits "K," "L," "N," and "O," which were admitted and filed. The defendant then offered in evidence seven exhibits, Exhibits 1, 2, 3, 4, 5, 6, 7, which were admitted and filed, and this being the regular time for adjournment of this court, the Court duly admonished the jury and excused them from further service in this case until Wednesday, May 27th, 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. [37]

**[Plaintiff's Exhibit "K"—Letter, Dated May 13,
1913, Alamo Cattle Co. to J. G. Hall.]**

W. BECKFORD KIBBEY, Jr.,
President.

RAMON ELIAS,
General Manager.

ALAMO CATTLE CO., S. A.
MAGDALENA, SONORA, MEXICO.

Box 24.

HACIENDA EL ALAMO.

Nogales, Ariz., May 13th, 1913.

Mr. J. G. Hall,
El Paso, Texas.

Dear Sir:

Referring to the contract between ourselves and Mr. E. W. Meyers, dated Jan. 16th, 1913, and trans-

ferred to you by him on Feb. 4th, for 4,000 two year old steers and 1,000 four year old steers, to be delivered during April and May, 1913, in trainload lots, beg to advise you that owing to the fact that a herd of two year old steers was tendered you on May 12th, consisting of 1,093 steers from which we asked you to cut a trainload, but which you refused to cut or receive, after having come down expressly to receive these cattle, after due notice according to contract, we consider that you have forfeited all right in the aforesaid contract, and hereby so advise you.

Very respectfully yours,
ALAMO CATTLE COMPANY, S. A.
By W. BECKFORD KIBBEY, Jr.,
Pres.

K: AES.

[Endorsement]: Plaintiff's Exhibit "K," Marked for Identification. No. 10. Hall vs. Alamo Cattle Company. Admitted and Filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.
[38]

[Plaintiff's Exhibit "L"—Telegram, Dated May 14, 1913, J. G. Hall to Alamo Cattle Co.]

THE WESTERN UNION TELEGRAPH
COMPANY.

El Paso, Tex., May 14, 1913.

Alamo Cattle Co.

Care First National Bank, Nogales, Ariz.

I am ready and willing to receive and hereby demand all cattle coming within contract of January

40 *Alamo Cattle Company, Sociedad Anonima,*
sixteenth with Myers which contract was transferred
to me. Delivery to be made between May twenty-
ninth and June first nineteen thirteen in train lots.

Advise when you want cattle cut.

J. G. HALL.

Chg. J. G. Hall.

3:40 P. M.

[Endorsement]: Plaintiff's Exhibit "L," Marked
for Identification. No. 10. Hall vs. Alamo Cattle
Co. Admitted and Filed May 26, 1914. George W.
Lewis, Clerk. By Effie D. Botts, Deputy. [39]

**[Plaintiff's Exhibit "N"—Telegram, Dated May 11,
1913, J. G. Hall to Alamo Cattle Co.]**

THE WESTERN UNION TELEGRAPH
COMPANY.

El Paso, Texas, May 11, 1913.

Alamo Cattle Co.

Nogales, Ariz.

Arrive Nogales to-morrow to receive all cattle com-
plying with terms of contract.

J. G. HALL.

CHG—J. G. Hall.

[Endorsement]: Plaintiff's Exhibit "N," Marked
for Identification. No. 10. Hall vs. Alamo Cattle
Co. Admitted and Filed May 26, 1914. George W.
Lewis, Clerk. By Effie D. Botts, Deputy. [40]

[Plaintiff's Exhibit "O"—Contract for Purchase and Sale of Cattle, Dated April 11, 1913, J. G. Hall and Clay, Robinson & Co.]

CONTRACT FOR PURCHASE AND SALE OF CATTLE.

THIS AGREEMENT, made and entered into this 11th day of April, 1913, by and between J. G. Hall of Denver, Colorado, hereinafter known as the seller; and Clay, Robinson & Co. of Denver, Colorado, hereinafter known as the buyers:

WITNESSETH AS FOLLOWS: For and in consideration of the prices herein mentioned, which have been mutually agreed upon by both parties to this contract, the seller hereby agrees to sell and deliver off cars in good shipping condition at Denver, Colorado, on or about May 15th, to June 5th, 1913, the following described cattle; about 4,000 or 5,000 head of two year old steers at \$28.00 per head, all to be full age by time of delivery, and in the following brands:

卐 7

, and are to be the same steers received by the seller from the Alamo Cattle Co., of Magdalena, Sonora, Mexico. The buyers agree to pay all freight, feed and shipping charges necessary to transport said cattle from Nogales, Arizona, to Denver. The seller has the privilege of a 15 per cent cut after all stags, cripples, lump-jaws, sway-backs, blind or diseased steers, or any that for whatever cause are considered unmerchantable, or under age, have been cut out, and this privilege of cut is to be passed on to the buyers or their authorized agent; said cut to be made at the ranches in Mexico.

The seller hereby acknowledges the receipt of Eight Thousand and no/100 Dollars (\$8,000.00) in hand paid this day by the buyers as earnest money on this contract, and which is to be applied on the purchase price at the rate of Two and no/100 (\$2.00) per head as the cattle are loaded; and it is hereby understood and agreed that the seller may make draft on the buyers in payment of the steers as they are loaded at Nogales, and should there be any difference in count when steers are unloaded at Denver, correction of payment shall then be made.

It is further understood and agreed that the buyers
[41]

sheet #2

shall be entitled to all three year old steers that may be delivered to the seller under his contract with the said Alamo Cattle Co., without any reservations being made at the time of gathering or delivery, until the buyer's contract is filled.

It is understood and agreed that in case delivery of these steers cannot be made on account of either revolutionary trouble or quarantine regulations, the seller is to return to the buyer the advance payment of \$8,000.00 with interest at the rate of 8%.

WITNESS OUR HANDS, this 11th day of April, 1913.

J. G. HALL,

CLAY, ROBINSON & CO.,

By J. A. JOHNSTONE, Mgr.

[Endorsement]: Plaintiff's Exhibit "O," Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and Filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [42]

[Defendant's Exhibit No. 1—Night Lettergram
Dated May 9, 1913, K. D. Oliver to Agent,
Southern Pacific Co.]

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COM-
PANY.

Received at 1 GS AG 28. NL.

TUCSON, AZ., May 9, 1913.

Agent. Southern Pacific Co.,
Nogales, Az.

Referring to our file number two car order for
thirty-two Santa Fe stock cars load your station to-
morrow please cancel as cattle not ready writing you
from El Paso.

K. D. OLIVER.

8:30 A. M.

[Endorsement]: Defendant's Exhibit No. 1.
Marked for Identification. No. 10. Hall vs. Alamo
Cattle Co. Admitted and filed May 26, 1914. George
W. Lewis, Clerk. By Effie D. Botts, Deputy. [43]

**[Defendant's Exhibit No. 2—Letter Dated May 24,
1913, J. G. Hall to J. L. Pope, Agent, Southern
Pacific Co.]**

Denver Office:
Great Western Commission Co.,
Union Stock Yards.

El Paso Office:
304 American Bank Bldg.
Telephone 4266.

J. G. HALL,
Live Stock Commission.

Southern Cattle Bought on Orders.

K. D. Oliver, Manager.

El Paso, Texas, May 24, 1913.

Ref. Our File #2.

J. L. Pope, Esq.,
Agt. Southern Pacific,
Nogales, Ariz.

Dear Sir:—

Referring to our car order file number as above and in reply to your favor of the 22nd in regard to same, beg to advise you that it will be impossible for us to get these cattle out this spring, and will therefore cancel the entire order.

Thanking you for your letter, and your attention to this matter, beg to remain,

Yours truly,

J. G. HALL.

By P. B. DIXON.

CC to W. R. Brown, El Paso, Tex.

CC to Agent Santa Fe, Deming, N. M.

[Endorsement]: Defendant's Exhibit No. 2. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [44]

**[Defendant's Exhibit No. 3—Letter Dated April 28,
1913, K. D. Oliver to Agent Southern Pacific
Co.]**

Denver Office:

Great Western Commission Co.,
Union Stock Yards.

El Paso Office:

304 American Bank Bldg.
Telephone 4266.

J. G. HALL,

Live Stock Commission.

Southern Cattle Bought on Orders.

K. D. Oliver, Manager.

El Paso, Texas, Apr. 28, 1913.

Ref. Out File #2.

Agent Southern Pacific Ry. Co.,

Nogales, Ariz.

Dear Sir:—

We are in receipt of a letter today from Mr. Kibbey, in which he advise us that he has placed a definite car order in our name, for cars in which to load the first shipment of the cattle purchased from him.

Under date of February 7, we placed an order with you, our file #2, for 150 forty foot Santa Fe stock cars, and the order that Mr. Kibbey has just placed is referring to this order.

Will you kindly furnish us with information as to how many cars Mr. Kibbey has ordered, and whether or not they are Santa Fe forty foot cars.

For your information beg to state that we wish to order all of our cars to be 40 foot Santa Fe cars.

46 *Alamo Cattle Company, Sociedad Anonima,*

Trusting to receive this information from you by
return mail, beg to remain,

Yours truly,
K. D. OLIVER,
Manager.

KDO/PBD.

[Endorsement]: Defendant's Exhibit No. 3.
Marked for Identification. No. 10. Hall vs. Alamo
Cattle Co. Admitted and filed May 26, 1914. George
W. Lewis, Clerk, By Effie D. Botts, Deputy. [45]

[Defendant's Exhibit No. 4—Letter Dated May 5,
1913, J. G. Hall to Agent Southern Pacific Ry.
Co.]

Denver Office:
Great Western Commission Co.,
Union Stock Yards.

El Paso Office:
304 American Bank Bldg.
Telephone 4266.

J. G. HALL,
Live Stock Commission.
Southern Cattle Bought on Orders.
K. D. Oliver, Manager.

El Paso, Texas, May 5, 1913.

Ref. Our File #2.

Agent Southern Pacific Ry. Co.,
Nogales, Arizona.

Dear Sir:—

Beg to advise you that we will need 32 forty foot
Santa Fe stock cars to load at your station May 10th.

These cars are intended for the movement of cattle
purchased from the Alamo Cattle Co., from your
station to Denver, Colo., via the Santa Fe at Deming.

These are a part of the cars ordered under date of

February 7th, our file number as above.

Will you kindly give this matter your usual prompt attention.

Yours truly,

J. G. HALL.

By P. B. DIXON.

CC to W. R. Brown, El Paso, Tex.

CC to Agent Santa Fe, Deming, N. M.

[Endorsement]: Defendant's Exhibit No. 4. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [46]

[Defendant's Exhibit No. 5—Letter Dated February 4, 1913, Ed. W. Myers et al. to Alamo Cattle Co.]

Denver Office:

Great Western Commission Co.,
Union Stock Yards.

El Paso Office:

304 American Bank Bldg.
Telephone 4266.

J. G. HALL,

Live Stock Commission.

Southern Cattle Bought on Orders.

K. D. Oliver, Manager.

El Paso, Texas, Feb. 4, 1913.

Alamo Cattle Co., S. A.,

Magdalena, Son., Mexico.

Gentlemen:

Beg to advise that I have this day sold and transferred all my right title and interest to the contract I hold with your Company, dated January 16th, 1913, for four to five thousand two year old steers and one

48 *Alamo Cattle Company, Sociedad Anonima,*
thousand four year old steers, to J. G. Hall, of El Paso, Texas.

Mr. Hall shows his approval of this letter by signit with me; and also his willingness and intention to carry out the terms of the contract in every way.

Yours truly,
ED. W. MYERS,
J. G. HALL,
By K. D. OLIVER,
Manager.

[Endorsement]: Defendant's Exhibit No. 5. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk, By Effie D. Botts, Deputy. [47]

[Defendant's Exhibit No. 6—Letter Dated April 21, 1913, K. D. Oliver to Alamo Cattle Co.]

Denver Office:
Great Western Commission Co.,
Union Stock Yards.

El Paso Office:
304 American Bank Bldg.
Telephone 4266.

J. G. HALL,
Live Stock Commission.
Southern Cattle Bought on Orders.
K. D. Oliver, Manager.

El Paso, Texas, Apr. 21, 1913.

Alamo Cattle Co.,
c/o First Nat. Bank,
Nogales, Ariz.

Gentlemen:

With reference to the cattle we have purchased from you, beg to advise that we would like to receive the first train of the two year old steers to load at

Nogales about the 10th of May.

Wish you would advise us by return mail, or by wire if you are delayed much in getting this letter, the exact date it will be necessary for the writer to be at Nogales to go with you to cut the cattle.

We want to receive these two year old steers in trainloads of about 1,000 to 1,500 head, for the man who has purchased these cattle in Montana has several days drive from the Railroad to his ranch, and does not wish to make this drive with only a small bunch.

Awaiting an immediate reply from you, which is very necessary to enable us to definitely place an order for the exact number of cars we will need, (the original blanked order for all having been already placed) beg to remain,

Yours truly,

K. D. OLIVER.

Manager.

KDO/PBD.

[Endorsement]: Defendant's Exhibit No. 6. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk, By Effie D. Botts, Deputy. [48]

[Defendant's Exhibit No. 7—Night Lettergram
Dated May 9, 1913, K. D. Oliver to W. B.
Kibbey, Jr.]

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COM-
PANY.

RECEIVED AT 6 GS AG 12. NL.

TUCSON, AZ., May 9, 1913 10th

W. B. Kibbey, Jr.,

Nogales, Az.,

Going El Paso in the morning and will write you
fully from there.

K. D. OLIVER.

840. AM.

[Endorsement]: Defendant's Exhibit No. 7.
Marked for Identification. No. 10. Hall vs. Alamo
Cattle Co. Admitted and filed May 26, 1914. George
W. Lewis, Clerk. By Effie D. Botts, Deputy. [49]

[Minutes of Court—May 27, 1914.]

*In the United States District Court for the District
of Arizona.*

Minute Entry of Wednesday, May 27th, 1914.

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad
Anonima,

Defendant,

This case having been continued from Tuesday, May 26th, 1914, come now the same parties hereto and come also the jurors herein; their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, recalled James A. Johnson for further examination in chief, and called as witness W. L. Howell, who was duly examined and cross-examined, and offered in evidence, counsel for the defense agreeing, the affidavit of James Gilispie, it being conceded that if the said James Gilispie were present he would so testify. By stipulation of counsel, it was agreed, and so stated, that Ed. W. Myers is a citizen of Texas. James G. Hall was recalled to the stand for further cross-examination, and the plaintiff offered in evidence one exhibit, Exhibit "P," which was admitted and filed, and thereupon the plaintiff rested his case. The defendant then *to* moved the Court for an instructed verdict in its favor and against the defendant, which motion was argued, and thereupon denied by the Court. The defendant then, to maintain upon its part the issues herein, called as witnesses Ed. W. Myers and Ben Sneed, who were duly sworn and placed under the rule, and called as witnesses W. Beckford Kibbey, Jr., and Ramon Elias, who were duly sworn, examined and cross-examined, and offered in evidence an exhibit, Exhibit 8, which was admitted and filed, and this being the regular time for adjournment of this court, the Court duly admonished the jury and excused them from further service in this case until Thursday, the 28th day of

52 *Alamo Cattle Company, Sociedad Anonima,*
May, A. D. 1914, at ten o'clock A. M., to which time
the further trial of this case is now ordered continued.
[50]

**[Plaintiff's Exhibit "P"—Letter Dated April 18,
1913, West Coast Cattle Importers Assoc. to K.
D. Oliver.]**

EXECUTIVE COMMITTEE:

Joseph E. Wise, President,
Calabasas, Ariz.
R. C. Mossman, 1st Vice-Pres.,
Kansas City, Mo.
L. M. Lord, 2nd Vice-Pres.,
South Omaha, Nebr.
B. A. Packard, 3rd Vice-Pres.,
Douglas, Ariz.
Chas. F. Silva, 4th Vice-Pres.,
Sacramento, Cal.
W. B. Kibbey, Jr., Secretary,
Nogales, Ariz.
Chas. F. Holler, Treasurer,
Nogales, Ariz.

EXECUTIVE COMMITTEE:

J. M. Rondstadt,
Tucson, Ariz.
J. C. Gatti,
Clifton, Ariz.
H. J. Saxon,
Nogales, Ariz.
C. E. Wiswold,
Naco, Ariz.
K. D. Oliver,
El Paso, Tex.
L. E. Booker,
El Paso, Tex.
Henry Levin,
Nogales, Ariz.
E. A. Tovrea,
Bisbee, Ariz.

**THE WEST COAST CATTLE IMPORTERS'
ASSOCIATION.**

Headquarters Nogales,
Arizona.

Nogales, Ariz., April 18, 1913.

Mr. K. D. Oliver,
304 Am. Bank Bldg.,
El Paso, Texas.

Dear Sir:

Enclosed please find copy of Dr. Bray's letter of
the 9th instand.

You are thoroughly aware of just what Dr. Bray
said in connection with the movement of cattle from
points south of Magdalena.

During my last meeting with him, I asked him
what would be his attitude in connection with the

movement of cattle from points south of Magdalena, but from known clean territory. He stated that he would prefer to have me refer the matter to Dr. Melvin, who was present. I then got out the map of Sonora, and pointed out the location of the Espinosa cattle, which are located practically due west of Carbo, and asked Dr. Melvin, in Dr. Bray's presence, if I could move these cattle to my ranch, and export them safely, provided they did not come in contact with the Zepeda cattle, Dr. Melvin's reply was *the* he believed we would be perfectly safe in bringing cattle from known clean territory.

In his letter of the 9th, Dr. Bray practically repudiates his verbal permission, given us at the El Paso meeting, and leaves the whole matter to Dr. Melvin to decide. We are writing Dr. Melvin to-day, asking him to decide the question of the new quarantine line, and on receiving his reply, will advise you regarding his decision.

The question between Dr. Bray and ourselves is a very delicate one, and we do not feel at liberty to state exactly what we think about the stand taken by him. In our reply to his letter, we have simply written him that we note contents of his letter, and are forwarding [51] letter to Dr. Melvin, a copy of which we inclose in Dr. Bray's letter.

We wish you would have a talk with him, and sound him diplomatically regarding what he expects to do in connection with our cattle, as it is of vital interest to us to know as soon as possible what to expect.

If we are unable to get cattle from south of Mag-

54 *Alamo Cattle Company, Sociedad Anonima,*
dalena, it will complicate an already difficult situa-
tion.

Yours very truly,
WEST COAST CATTLE IMPORTERS ASSOC.,
By W. BECKFORD KIBBEY, Jr.,
Sec'y.

K:ES.

[Endorsement]: Plaintiff's Exhibit "P." Marked
for Identification. No. 10. Hall vs. Alamo Cattle
Co. Admitted and filed May 27, 1914. George W.
Lewis, Clerk. By Effie D. Botts, Deputy. [52]

[Defendant's Exhibit No. 8—Telegram Dated May
13, 1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH COM-
PANY.

RECEIVED AT 107 NORTH OREGON ST., El
Paso, Phone 4321. Always Open.

70 US ZS 2 1 COLLECT EXTRA.

Nogales Az May—13th via Tucson Az May 14
K. D. Oliver,

El Paso, Texas.

Myers refuses to compromise advise if you wish to
go ahead with our verbal agreement.

ALAMO CATTLE CO.,
KIBBEY President.
525 P. M.

[Endorsement]: Defendants' Exhibit No. 8.
Marked for Identification. No. 10. Hall vs. Alamo
Cattle Co. Admitted and filed May 27, 1914. George
W. Lewis, Clerk. By Effie D. Botts, Deputy. [53]

[Minutes of Court—May 28, 1914.]

*In the United States District Court for the District
of Arizona.*

Minute Entry of Thursday, May 28th, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

This case having been continued from Wednesday, May 27th, 1914, come now the same parties hereto and come also the jurors herein; their names are called and all answering thereto, respectively, the further trial of this case proceeds as follows: The defendant then, to further maintain upon its part the issues herein, recalled as witness Ramon Elias for further examination in chief. Harry Nixon was duly sworn as court reporter herein. The defendant then called as witnesses Thomas J. Donahue, Ben Sneed, A. M. Joffory and Ed. W. Myers, who were duly examined and cross-examined, and thereupon the defendant rested its case. The plaintiff then called in rebuttal John G. Hall, and thereupon the plaintiff rested his case. The defendant then moved the Court for a directed verdict in its favor and against the plaintiff, which motion was overruled by the Court, to which ruling of the Court the defendant, in open court, then and there excepted. There being no further testimony offered on either side and

56 *Alamo Cattle Company, Sociedad Anonima,*
the evidence being closed, argument of the respective
counsel was had in part, and this being the time for
an adjournment of this court, the Court duly ad-
monished the jury and excused them from further
service in this case until Friday, the 29th day of May,
A. D. 1914, at ten o'clock A. M., to which time the
further trial of this case is now ordered continued.
[54]

[Minutes of Court—May 29, 1914.]

*In the United States District Court for the District
of Arizona.*

Minute Entry of Friday, May 29th, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,
Defendant.

This case having been continued from Thursday,
May 28th, 1914, come now the same parties hereto,
and come also the jurors herein; their names are called
and all answering thereto respectively, the further
trial of this case proceeds as follows: The argument
of counsel was concluded, and the Court thereupon
instructed the jury orally, and said jury retire in
charge of T. T. Smith, bailiff, officer of this court,
first duly sworn for that purpose, to consider their
verdict. And subsequently said jurors return into
court, their names are called, and all answering
thereto, respectively, upon being asked if they have

agreed upon a verdict, through their foreman, report that they have agreed, and thereupon, through their foreman, present their verdict. Whereupon said verdict was ordered recorded as follows:

No. 10.

“JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO.,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and assess his damages at the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars.

GUST. A. HOFF, Foreman.”

And the Clerk inquiring of said jurors whether such is their verdict, they say that it is and so say they all. Whereupon said jury was ordered discharged from this case. And it is ordered that the defendant be given thirty days to prepare a bill of exceptions and the usual time to prepare an appeal. The defendant then in open court served notice of motion for a new trial, and it was ordered that the said motion for a [55] new trial be set for hearing on Wednesday, the 24th day of June, A. D. 1914, at ten o'clock A. M., and that the defendant have ten days, from this date to prepare and file its motion for a new trial. The plaintiff then moved the Court for judgment on the verdict returned this day, which

58 *Alamo Cattle Company, Sociedad Anonima,*
motion was granted, and thereupon the following
judgment was rendered, to which the defendant in
open court then and there excepted:

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad
Anonima,

Defendant.

Judgment.

This cause having come on regularly for trial on the 22d day of May, 1914, before a jury duly empaneled and sworn to try the issues, plaintiff being present in court in person and by his attorneys, Messrs. F. C. Knollenberg, Charles R. Loomis, George J. Stoneman and Reese M. Ling, and defendant being represented by its attorneys, Messrs. Wm. M. Seabury and Frank J. Barry, and plaintiff having introduced oral and documentary evidence in support of the allegations contained in his complaint, and defendant having introduced oral and documentary evidence in support of the allegations contained in its answer, and the issues in this cause and the evidence having been submitted to the jury for determination on the 29th day of May, 1914, and the Court having charged the jury as to the law in the case, and the jury having returned in the open court its verdict, in words and figures as follows, to wit:

No. 10.

“JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and assess his damages at the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars.

GUST. A. HOFF, Foreman.”

And plaintiff having on the 29th day of May moved in open court [56] that judgment be entered in accordance with said verdict and said motion having been by the Court granted;

NOW, THEREFORE, it is ordered and adjudged that the plaintiff, John G. Hall, do have and recover from defendant, Alamo Cattle Company, Sociedad Anonima, the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars (\$21,225.00), together with all costs, and that execution issue therefor. [57]

*In the District Court of the United States in and for
the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,

Defendant.

Petition for New Trial.

Comes now the defendant, the Alamo Cattle Company above named and moves the Court to vacate and set aside the verdict rendered herein by the jury in the above-entitled cause on or about May 29th, 1914, in favor of the plaintiff and against the defendant above named, and to grant the defendant a new trial in the said cause upon each and all of the following grounds:

I.

Upon the ground that said verdict is contrary to and against the law.

II.

Upon the ground that errors in law occurring at the trial were committed which require the said verdict to be set aside and a new trial to be granted, and in this connection your petitioner respectfully alleges that the errors last referred to and each of them among others consisted in the erroneous admission and exclusion of evidence upon the trial of said cause in each and all of the following respects:

1.

The Court erred in allowing the plaintiff, Hall, as a witness to testify by way of conclusion and not by virtue of any statement of fact that the said plaintiff was prepared [58] and ready to receive and pay for all the cattle the defendant could deliver to him under the contract sued upon, as appears on pages 26 to 28 of the reporter's transcript.

2.

And the Court also erred in ruling throughout the

trial of the cause that it was not incumbent upon nor the duty of the plaintiff to prove that he was ready, willing and able to perform his part of the contract sued upon in substance until the defendant had performed its part of said agreement, as appears from pages 120 to 125 of the reporter's transcript, and throughout the charge of the Court as disclosed by the reporter's transcript.

3.

The Court further erred in sustaining the objection by plaintiff's counsel to the question propounded by defendant's counsel to the witness Hall (page 49 reporter's transcript):

“Q. Did you or did you not state to Mr. Myers at El Paso, in substance, that you or Mr. Oliver had made a mistake?”

Also in allowing the witness Hall to answer the question (page 56 reporter's transcript) addressed to the witness by plaintiff's counsel, over the objection and exception of defendant's counsel:

“Q. Mr. Hall, did Clay, Robinson & Co. or their agent, Mr. Johnston, ever indicate to you that this contract that has just been read was cancelled or would be cancelled in the event you were able to deliver cattle purchased, contracted to be purchased from the Alamo Cattle Company?”

and also in denying the motion of the defendant's counsel to strike out the answer of the said witness to said question (page 57 reporter's transcript).

4.

The Court also erred in denying defendant's mo-

tion to strike out the answer of the witness, Oliver (pages 71-72 reporter's transcript) as follows: [59]

"A. Do you know whether or not there was any cancellation of the order for any of these cars? A. I cancelled them myself.

Q. When?

A. I don't remember the exact date.

Q. Before or after this trip to Mexico about which you testified?

A. That I am not sure, I cancelled them because—if I cancelled them before it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards it was after I saw the cattle."

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that is not a proper response to the inquiry and we move to strike it out.

The COURT.—I'll overrule that objection.

Mr. SEABURY.—Exception."

5.

The Court further erred in sustaining the objection of plaintiff's counsel to the question propounded by defendant's counsel to the witness Oliver (page 94 reporter's transcript) as follows:

"Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle?"

6.

The Court erred in denying the motion of defendant's counsel to strike out the answer of the witness,

Johnston (page 116 reporter's transcript), wherein the witness said:

“A. There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition.”

for the reasons stated at the trial by defendant's counsel as it appears from said reporter's transcript.

7.

The Court erred in overruling the objection of defendant's counsel to the question (page 118 reporter's transcript)

“Q. Did you see any runts or stags?”

and by so doing in construing the contract sued upon in substance to mean that if the herd of cattle tendered by defendant to [60] plaintiff contained a substantial number of disqualified cattle, such a herd was not properly tendered by the defendant to plaintiff because of the presence of said defective or unmerchantable cattle therein, which construction of said contract required the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all, and allowed the plaintiff to refuse to perform his contract, although plaintiff could and should have selected from said herd a train-load of cattle which were in all respects up to the requirements of the contract.

8.

The Court erred in denying the defendant's motion to strike out the answer of the witness, Johnston, to the question (page 120 reporter's transcript):

“Q. What reason did he give?”

9.

The Court further erred in permitting the witness, Hall, over the objection and exception of defendant's counsel to answer the questions propounded to him by the plaintiff's counsel, that appear from page 166 to page 168 of reporter's transcript.

10.

The Court erred in excluding, over the objection and exception of defendant's counsel, all evidence tending to establish and prove the allegations contained in the defendant's counterclaim (pages 200–207 reporter's transcript).

11.

The Court erred in holding and deciding that the amount of damages which the defendant might recover of and from the plaintiff was limited to the sum of Ten Thousand (\$10,000) Dollars, and in holding that such construction of the contract sued upon was not affected by the question: [61]

“At whose suggestion and request the written clauses of the contract sued upon were inserted.”
(Pages 208–209 reporter's transcript.)

12.

The Court erred in sustaining the objection of plaintiff's counsel to the question (pages 248–249 reporter's transcript):

“Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?”

13.

The Court erred in excluding evidence of a conversation between the witness Elias and one Myers, in the presence of the plaintiff or its duly authorized representative, Oliver (pages 256–257 reporter's transcript).

14.

The Court erred in permitting the witness, Joffroy, to testify in response to questions by plaintiff's counsel, over the objections and exceptions of defendant's counsel, as follows (pages 335–336 reporter's transcript) :

“(By Mr. STONEMAN.)

Q. You would not expect people to order cars unless they had a use for them, would you?

Now, Mr. Witness, isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground that the proof of custom is not admissible—not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Have you ever known people, anyone else besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.

Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. [62] Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove or disprove that issue.

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain day to cancel that order and re-order in the event that they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Yes, sir."

15.

The Court erred in overruling the objection of defendant's counsel to the question propounded by plaintiff's counsel to the witness Myers (page 359 reporter's transcript):

"Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract: that the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two year old steers and four dollars a head for the

four year old steers only in case they are delivered?"

upon the grounds and for the reasons stated at the trial by defendant's counsel, as it appears by said reporter's transcript.

And defendant alleges that each and all of the rulings heretofore specified and complained of herein were prejudicial to the defendant and among other errors committed at the trial resulted in an adverse verdict against the defendant.

III.

Upon the ground of the insufficiency of the evidence to justify and support the verdict of the jury, among other things, for the reason that there was no evidence establishing the readiness and ability of the plaintiff to perform his part of the contract after May 9th and before May 12, 1913; but, on the contrary, the uncontradicted evidence was the sole ability of the plaintiff Hall to perform his part of the contract resulting from his sale of the cattle to Clay, Robinson & Company by and through a representative [63] of Clay, Robinson & Company, namely, the witness Johnston, and that the said Johnston refused to accept the said cattle on May 9th, from which it follows that on May 12th, 1913, the plaintiff was not ready, willing or able to perform his part of the contract sued upon.

IV.

Upon the ground that the learned Court further erred in denying the motion of the defendant made at the close of the plaintiff's case (pages 168-173 reporter's transcript) for a directed verdict in its

favor, and also in denying the renewal of said motion duly made by defendant's counsel (pages 362-363 reporter's transcript) at the close of all of the evidence, upon the ground that the plaintiff's evidence showed that prior to the commencement of suit and about the 12th day of May, 1913, the defendant had made and entered into a valid contract with the plaintiff for the purpose of compromising the dispute which then and there existed between the plaintiff and the defendant, with reference to the contract sued upon herein, and for the purpose of superseding and abrogating the contract sued upon, for the reason that such proof constituted a fatal variance with the pleadings in said cause; and upon the ground of said variance and because the plaintiff had proved a cause of action not alleged in the complaint, which was in reality a substitute for the cause of action sued upon, the plaintiff was not entitled to a verdict and defendant was entitled to judgment, directing a verdict in its favor against the plaintiff.

V.

The learned Court further erred in each and all of the following respects:

1.

The Court erred in declining and refusing to charge the jury as duly requested by defendant in writing, which request [64] was duly submitted to the Court before the close of the evidence and before the Court charged the jury, as follows:

“Defendant's Written Request No. 2.

By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to de-

liver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good or better than Terrasas cattle.'

2.

The Court likewise erred in refusing to give defendant's written request No. 3, so presented to the Court as aforesaid:

"Defendant's Written Request No. 3.

But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant fifteen (15) days' notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars."

3.

The Court likewise erred in refusing to give defendant's written request No. 4, so presented to the Court as aforesaid:

"Defendant's Written Request No. 4.

I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and

to pay for them when they were placed on board the cars furnished by the plaintiff."

4.

The Court likewise erred in refusing to give defendant's written request No. 10, so presented to the Court as aforesaid:

"Defendant's Written Request No. 10.

If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three [65] hundred (7,300) dollars in addition, the defendant is entitled to recover from the plaintiff by way of counterclaim."

5.

The Court likewise erred in refusing to give defendant's written request No. 11, so presented to the Court as aforesaid:

"Defendant's Written Request No. 11.

In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage, if any were sustained by it, over and above the said ten thousand (\$10,000) dollars by

reason of the plaintiff's breach of the contract."

6.

The Court likewise erred in refusing to give defendant's written supplemental request No. 1, so presented to the Court as aforesaid:

"Defendant's Written Supplemental Request No. 1.

If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrasas cattle, and that plaintiff refused to receive them, then you must find a verdict for the defendant."

7.

The Court likewise erred in refusing to give defendant's written supplemental request No. 2, so presented to the Court as aforesaid:

"Defendant's Written Supplemental Request No. 2.

I further charge you that the provision in the contract which required the buyer to give 15 days' notice before the delivery of each shipment was a provision for the benefit of the seller."

8.

The Court likewise erred in refusing to give defendant's written supplemental request No. 3, so presented to the Court [66] as aforesaid:

"Defendant's Written Supplemental Request No. 3.

I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer, during April or May,

1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.”

9.

The Court likewise erred in refusing to give defendant's written supplemental request No. 4, so presented to the Court as aforesaid:

“Defendant's Written Supplemental Request No. 4.

I further charge you that it was not contemplated by the terms of the contract sued upon that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram dated May 14th.”

10.

The Court likewise erred in refusing to give defendant's written supplemental request No. 7, so presented to the Court as aforesaid:

“Defendant’s Written Supplemental Request No. 7.

I further charge you that, even if you find that the cattle tendered to plaintiff on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant.”

VI.

The learned Court further erred in giving, at the request of the plaintiff, over the exception duly taken by the defendant, the plaintiff’s written request No. 5, as follows: [67]

“Plaintiff’s Written Request No. 5.

You are also instructed that the burden of proof is upon the Alamo Cattle Company before they can recover judgment against the plaintiff, to show that the cattle alleged to have been tendered on May 9th and May 12th, 1913, fully complied with the contract in every respect.” and also in giving plaintiff’s written request No. 7, as modified by the Court:

“Plaintiff’s Written Request No. 7, as Modified by the Court.

You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the defendant dated May 13, 1913, constituted a breach of the contract on the part

of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.”

(page 371 reporter’s transcript); to all of which defendant duly excepted.

VII.

The Court further erred in charging the jury upon its own motion.

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine and inspect or cut from the herd of cattle gathered for delivery by defendant cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship and unmerchantable cattle, cattle under two years old, and all cattle not of grade as good or better than Terrasas cattle.”

upon the ground that such instruction placed an erroneous construction upon the terms and provisions of the contract sued upon, and in effect relieved the plaintiff of the necessity of accepting a train-load of cattle which were in all respects in

accordance with the terms of the contract, provided such train-load of said cattle could have been cut from the herd of cattle [68] tendered by the defendant to the plaintiff; and upon the further ground that it permitted the jury to find a verdict for the plaintiff even though the jury might have found that there were only a few unmerchantable cattle, unsubstantial in amount, in the herd of cattle so tendered to the plaintiff, and relieved the plaintiff of his obligation and duty under such circumstances to point out and designate to the defendant which, if any, of such cattle were claimed by him to have been unmerchantable, and for that reason unacceptable to him under the terms of said contract; and withdrew from the jury the right to find that notwithstanding the presence in the herds so tendered by defendant to plaintiff of one or more cripples or other unmerchantable cattle, that in reality the defendant substantially performed its contract with the plaintiff by tendering a full train-load lot of good and merchantable cattle under and pursuant to and in strict accordance with the terms of the contract sued upon.

VIII.

The Court further erred in instructing the jury as follows:

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico cattle of the grade

and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15 per cent. of contract cattle.”

(Page 372 reporter’s transcript.)

IX.

The Court further erred in instructing the jury as follows:

“Unless therefore you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.”

(Page 373 reporter’s transcript.) [69]

X.

The Court further erred in instructing the jury as follows:

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff, cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15 per cent of clean, contract merchantable cattle and still leave a train-load lot to be delivered on board

cars at Nogales, Arizona.”

(Pages 373-374 reporter's transcript.)

XI.

The Court further erred in charging the jury (pages 376-377 reporter's transcript):

“ * * * and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrasas cattle, in train-load lots and in the numbers and of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those two issues are the main issues to be submitted to you for your determination.

I think, Gentlemen, I'll repeat that: under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant

to the plaintiff on or about May 12, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars are material—material issues in this case.”

XII.

The Court further instructed the jury (pages 379–380 [70] reporter’s transcript):

“Therefore, it seems to me * * * nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the bank at Nogales, or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that it don’t get to those points, they having gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona.”

WHEREFORE, your petitioner respectively prays that the verdict rendered herein on May 29, 1914, may be vacated and set aside, and that a new

trial of the issues in said case may be granted to your petitioner upon each and all of the aforesaid grounds.

Dated this 6th day of June, 1914.

FRANK J. BARRY,

Nogales, Arizona,

WILLIAM M. SEABURY,

Phoenix, Arizona,

Attorneys for Defendant.

Please take notice that the within notice will be brought to the attention of the Court on June 24, 1914, at the opening of court on that day or as soon thereafter as counsel may be heard at the Federal Courtroom, Tucson, Ariz.

FRANK J. BARRY,

WILLIAM M. SEABURY,

Attorneys for Defendant.

DeR.

Dated 6 day of June, 1914.

To Messrs. Stoneman & Ling,

Messrs. Loomis & Knollenberg.

Served with a copy of the within Petition for a New Trial this 6th day of June, 1914.

GEO J. STONEMAN,

REESE M. LING,

By M. C. WEAVER.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States in and for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Petition for New Trial. Filed June 8th, 1914, at

80 *Alamo Cattle Company, Sociedad Anonima,*
2 o'clock P. M. George W. Lewis, Clerk. By Geo.
T. Purves, Deputy Clerk. [71]

**[Order Overruling and Denying Petition for a New
Trial.]**

*In the United States District Court for the District
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad
Anonima,

Defendant.

And now comes the defendant by its attorney and files herein and presents to the Court its petition and motion for a new trial of this cause, and this matter coming on this day regularly to be heard. William M. Seabury, Esq., appearing as counsel for the defendant on behalf of said motion, and George J. Stoneman, Esq., appearing on behalf of the plaintiff in opposition thereto:

Now, on consideration thereof, the Court does, over the exception of the defendant duly made, overrule and deny said petition and motion for a new trial and refuses to grant defendant a new trial of this cause.

WM. H. SAWTELLE,

Judge.

Dated this 24 day of June, 1914.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. John G. Hall, Plaintiff, vs. The Alamo Cattle Company, Sociedad Anonima, Defendant. Order. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [72]

*In the United States District Court for the District
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Petition for Writ of Error.

And now comes the Alamo Cattle Company, Sociedad Anonima, defendant in the above-entitled cause, and says that on the 29th day of May, 1914, this Court entered judgment herein in favor of the plaintiff and against this defendant for the sum of Twenty-one thousand two hundred twenty-five 00/100 (\$21,225.00) Dollars and costs of suit, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of,

82 *Alamo Cattle Company, Sociedad Anonima*,
and that a transcript of the records, proceedings,
and the papers of this cause, duly authenticated
may be sent to said Court of Appeals.

FRANK J. BARRY,

W. M. SEABURY,

Defendant's Attorneys.

[Endorsements]: No. 10 (Tucson). In the United
States District Court for the District of Arizona.
John G. Hall, Plaintiff, vs. Alamo Cattle Company,
Sociedad Anonima, Defendant. Petition for Writ
of Error. Filed June 24, 1914. George W. Lewis,
Clerk. By Effie D. Botts, Deputy. [73]

**[Order Allowing Writ of Error and Fixing Amount
of Bond.]**

*In the District Court of the United States for the
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, *Sociedad Anonima*,
Defendant.

And now comes the defendant by its attorneys,
and filed herein and presented to the Court its peti-
tion praying for the allowance of a writ of error
and assignment of errors intended to be urged by it,
praying also that a transcript of the record and pro-
ceedings and papers, from which the judgment was
entered, duly authenticated, may be sent to the
United States Circuit Court of Appeals for the Ninth

Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon defendant giving bond, according to law, in the sum of One Thousand Dollars.

June 24, 1914.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Order Allowing Writ of Error. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [74]

*In the United States District Court for the District
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Assignment of Errors.

The defendant, the Alamo Cattle Company, Sociedad Anonima, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of error which it avers were committed by the Court in the rendition of the judgment against the defendant and in the proceed-

ings in said cause before and after the rendition of said judgment appearing in the records herein, that is to say:

I.

Upon the ground that said verdict is contrary to and against the law.

II.

That the Court erred in overruling defendant's objection to the following question propounded to the plaintiff by his attorney and in admitting the evidence evoked by said question upon the ground that said question called for, and said evidence is, a conclusion and not a statement of fact upon a matter which is not expert in nature, as follows:

Q. Now, Mr. Hall, with reference to your ability to pay for these cattle in the event the contract cattle, or cattle called for and up to the amount called for in the contract have been tendered to you, were you or were you not at that time ready, [75] willing and able to pay for a train-load of cattle?

Mr. SEABURY.—We object to that, if your Honor please. We think that the question as put calls for the conclusion of the witness upon a matter which is not expert in nature, and that the witness should be required to state what, if any, financial ability he had at that time to take up the contract—not his mere conclusion that he was able to pay one hundred and twenty thousand dollars, but the fact that he was able to do so.

The COURT.—Is it necessary for the plaintiff to show that under the contract at all? The contract is for these cattle and payment, as described in the

contract, is to be guaranteed in a manner satisfactory to the First National Bank of Nogales before such shipment crosses the line. Now, until the cattle have been furnished in accordance with the contract, is it necessary for the plaintiff to show anything about his financial ability?

Mr. SEABURY.—Does your Honor mean that the proof would be to indicate a breach on the part of the defendant, that being a part of the plaintiff's case that he was ready, willing and able to perform his part of it?

The COURT.—I mean to say that, if the jury come to the conclusion that the cattle of the kind and character specified in the contract were never delivered to them, as is contended by the plaintiff, then, if the jury find that to be the case, would the question of financial ability cut any figure in this case at all?

Mr. SEABURY.—I believe your Honor's view is right: that, if they conclude that there was a breach on the part of the defendant, that would relieve the plaintiff of the necessity of proving his ability to perform at some future date, but I don't believe it relieves the plaintiff of the obligation to prove the ability to perform the contract up to the time of the alleged breach.

The COURT.—I don't think so either, but,—

Mr. SEABURY.—My objection, if your Honor please, was addressed to [76] the form more than the substance. I objected to the witness being asked his conclusion as to his financial ability to pay one hundred and twenty thousand dollars. I thought he ought to be required to state some facts to indicate.

The COURT.—It seems to me that that would be a matter for your cross-examination. I overrule.

Mr. SEABURY.—I except.

Mr. STONEMAN.—I don't want the jury to obtain a wrong impression from the statement of counsel. The contract does not require that the plaintiff should be able to pay one hundred and twenty thousand dollars. It only requires that he should be able to pay for each shipment in train-load lots as it crosses the line.

Mr. SEABURY.—Which would make a total of one hundred and twenty thousand dollars.

The COURT.—Yes, when delivered.

Mr. SEABURY.—I don't mean to infer that he had to have the one hundred and twenty thousand dollars in his hand.

(By Mr. STONEMAN.)

Q. What is your answer to the question, Mr. Hall?

A. I was prepared and ready to receive and pay for all the cattle that they could deliver to me under the contract.

III.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to plaintiff upon his cross-examination by which defendant proposed to elicit testimony to show that the plaintiff had made an admission against interest. Said question was as follows:

Q. Did you or not state to Mr. Myers at El Paso, in substance, that you, or Mr. Oliver, had made a mistake?

Mr. STONEMAN.—We object, if your Honor

please, on the ground that it is not proper cross-examination upon any subject upon [77] which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose.

The COURT.—How is that material, Mr. Seabury, if he did make a mistake? Is that material in this case? He might have come to that conclusion, in view of the facts and circumstances, but would that shed any light on whether or not this contract had been complied with by the defendant or by himself?

Mr. SEABURY.—We thought, if your Honor please, that an admission to indicate that Mr. Hall admitted at that time that he was in fault; the expression that he had made a mistake in not accepting the cattle, we thought, included such an inference, and if so, it would be an admission against interest, and we have a right to show that Mr. Hall did say that he said so to him at that time.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

IV.

The Court erred in overruling defendant's objection to the following question propounded to the plaintiff by his counsel and in denying defendant's motion to strike out the answer of the said witness to said question upon the ground that the question was irrelevant and the testimony is not binding on the defendant, as follows:

(By Mr. STONEMAN.)

Q. Mr. Seabury asked you, Mr. Hall, has just asked you about this contract with Mr. Johnston, acting for

88 *Alamo Cattle Company, Sociedad Anonima,*
Clay, Robinson & Company. I hand you this paper
and ask you to tell me what that is.

A. This is the original contract that I made with
Clay, Robinson & Co. for the purchase of these cattle.

Mr. STONEMAN.—We offer it in evidence and
ask that it be marked plaintiff's exhibit with the
proper designation.

Mr. SEABURY.—No objection. [78]

Received in evidence and marked Plaintiff's Ex-
hibit "O."

Exhibit read to jury.

Q. Mr. Hall, did Clay, Robinson & Co. or their
agent, Mr. Johnston, ever indicate to you that this
contract that has just been read was cancelled or
would be cancelled in the event you were able to de-
liver cattle purchased, contracted to be purchased
from the Alamo Cattle Company?

Mr. SEABURY.—We object to the question as not
relevant to the case and not binding upon the defend-
ant.

The COURT.—What is the purpose of that?

Mr. STONEMAN.—If your Honor please, it has
been attempted to be brought out on cross-examina-
tion. The evident intent of the question is to show
that this contract of Clay, Robinson & Co. was can-
celled before—according to Mr. Hall's testimony,—
the Alamo Cattle trade was declared off. For that
reason the source of the ability of Mr. Hall to pay
for the cattle that might be delivered under the Alamo
contract had failed and was no longer available. I
simply was asking it on account of the cross-examina-
tion.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Q. What is the answer?

A. I hardly know how to answer that question. There was no formal cancellation of the contract. They still wanted the cattle and I gave them all the assistance I could and furnished them several thousand head of cattle to take the place of these cattle that I should have got from the Alamo Cattle Company.

Mr. SEABURY.—We move to strike the answer out as not responsive and also upon the ground that the answer includes alleged statements between Mr. Hall and Mr. Johnston which are in no way binding upon the defendant in this case. [79]

The COURT.—The statement was made by Mr. Johnston, you say?

Mr. SEABURY.—Yes, your Honor. The answer included alleged statements, as I understood it, between this gentleman and Mr. Johnston. His desire to comply with the Clay, Robinson contract which is in no way material or relevant to the issue here.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

V.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Oliver to a question propounded by plaintiff's counsel on the ground that said answer is in improper hypothetical form and is not responsive to said question, as follows:

Q. Do you know whether or not there was any can-

cellation of the order of any of these cars?

A. I cancelled them myself.

Q. When? A. I don't remember the exact date.

Q. Before or after this trip to Mexico about which you testified.

A. That I am not sure. I cancelled them because—if I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards, it was after I saw the cattle.

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that it is not a proper response to the inquiry and we move to strike it out.

The COURT.—I overrule that objection.

Mr. SEABURY.—Exception.

VI.

The Court erred in sustaining plaintiff's objection to a question propounded to plaintiff's witness Oliver by defendant upon his cross-examination by which defendant proposed to elicit testimony to show that plaintiff was not ready, willing and able [80] to perform the contract on his part as alleged in the complaint. Said question was as follows:

Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle?

Mr. STONEMAN.—We object for the reason that there is no evidence upon which that question can be based, in that it does not appear that the cattle were contract cattle ready for delivery free on board cars

at Nogales, and, under the contract, we don't have to make arrangements except under those conditions.

The COURT.—I would like to hear counsel for the defendant on that.

Mr. SEABURY.—I don't think I care to be heard on it, your Honor.

The COURT.—I sustain the objection.

Mr. SEABURY.—I except.

VII.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Johnston to a question propounded by plaintiff's counsel on the ground stated in defendant's motion, as follows:

Q. What proportion of the cattle in that herd were below the grade of Terrasas cattle?

A. There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition.

Q. Irrespective of the samples—

Mr. SEABURY.—I move to strike out the last answer of the witness, on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited [81] to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913.

The COURT.—I understood him to say that they went and looked at cattle that were to be delivered. Overruled.

Mr. SEABURY.—Exception.

VIII.

The Court erred in overruling defendant's objection to the following questions propounded by plaintiff to his witness Johnston upon the ground that in overruling the objection the Court construed the contract sued upon in substance to mean that if the herd of cattle tendered by defendant to plaintiff contained a substantial number of disqualified cattle, such a herd was not properly tendered by the defendant to the plaintiff because of the presence of said defective or unmerchantable cattle therein, which construction of said contract required the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all, and allowed the plaintiff to refuse to perform his contract, although plaintiff could and should have selected from said herd a train-load of cattle which were in all respects up to the requirements of the contract, as follows:

Q. Did you see any unmerchantable cattle in the bunch, Mr. Johnston? A. Yes, sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes, there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes, quite a number.

Mr. SEABURY.—We interpose objection to this line of examination, that even if the herd contained a substantial number of disqualified cattle, the plaintiff had the opportunity and privilege under his [82]

contract to cut out all of those, and in addition to cut fifteen per cent after that. So, unless this witness is prepared to testify that the herd did not contain a train-load of—

Mr. STONEMAN.—I can direct your Honor's attention that there is nothing in this contract that required us to clean the herd. The only thing—and that is optional—is that we might cut fifteen per cent out of this herd. If you will show me anything in that contract, if your Honor please, requiring us to clean that herd, I am almost willing to quit this lawsuit.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

IX.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Johnston to a question propounded by plaintiff on the ground that the testimony evoked is wholly immaterial to the issues involved in this case, as follows:

Q. What reason did he give?

A. He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cattle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle, the new government would take it away from him, and consequently he couldn't get those cattle.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case.

The COURT.—Objection overruled.

Mr. SEABURY.—Exception. [83]

X.

The Court erred in overruling defendant's objection to the following questions propounded to the plaintiff by his counsel for the reasons set forth below, as follows:

Q. You mean—was that agreement based upon any new consideration?

A. What do you mean by new consideration?

Q. Was it a proposal or a new contract—a proposal for avoiding trouble on the old contract?

Mr. SEABURY.—We object on the ground that it appears already from the statement made by Mr. Hall that it was a contract which comprised mutual promises, and that the mutual promises of each party was ample and sufficient to support the agreement.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. It was done as a compromise over this contract that is now in controversy, simply to avoid getting into a lawsuit.

Mr. STONEMAN.—Q. Did you at that time, or at any other time, say to Mr. Kibbey, or to Mr. Elias, that you would waive any right under the present contract? A. No, sir.

Mr. SEABURY.—Will you wait, please, Mr. Hall, until we have time to make our objections?

The WITNESS.—I beg your pardon.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the question is leading and not proper redirect examination.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Your answer? A. No, sir.

Q. Did Mr. Kibbey or Mr. Elias deliver to you any other cattle under that proposed agreement, or under the first contract? [84]

Mr. SEABURY.—We object to that if your Honor please, in so far as the question relates to the delivery under the contract in the suit, upon the ground that it is already answered; and in so far as it relates to the contract to which Mr. Hall has just testified, on the ground that it is not within the pleadings in this action, and as such is incompetent.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Was there any delivery?

A. None whatever.

Q. As a matter of fact, on the 13th day of May, 1913, you received a letter from the Alamo Cattle Company stating that your contract was at an end?

A. Yes, sir.

Mr. SEABURY.—We object to the question as very leading and not proper redirect examination, and according to my recollection, it is in contradiction of the record—the evidence in this case already.

The COURT.—I will have to see the letter before I can rule on that.

Mr. STONEMAN.—Letter under date of May 13, 1913; may I read it, your Honor?

The COURT.—It is not one that has been read?

Mr. STONEMAN.—Yes, sir, it is an exhibit in the case, Plaintiff's Exhibit "K." (Reads the letter to the Court.)

The COURT.—What date is that?

Mr. STONEMAN.—That letter is dated May 13, 1913, at Nogales, Arizona.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

XI.

The Court erred in sustaining plaintiff's objection to the introduction of and excluding all evidence offered by the [85] defendant tending to establish and prove the allegations contained in the defendant's counterclaim, as follows:

Q. Now, for the purpose of fulfilling your contract with Mr. Hall, had you or had you not purchased and gathered approximately five thousand head of cattle?

Mr. STONEMAN.—We object to it as leading and suggestive.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Tell us what you did with reference to the purchase and gathering of cattle for the performance of the contract with Mr. Hall.

Mr. STONEMAN.—I ask that the witness be confined to a time now other than has been already testified to. If he has made any endeavor to gather any other cattle.

Mr. SEABURY.—May I say, your Honor, that this is offered in support of our counterclaim. That is the purpose of it.

Mr. KNOLLENBERG.—If your Honor please, we object to the counsel introducing any evidence on the matter of his counterclaim, if that is the purpose of the question. According to the contract or at least our view of the contract, which is admittedly made and executed by the defendant, the damages in that contract that there was a breach on our part has been liquidated and regardless of the damage which the defendants may have sustained by virtue of our breach of it, if we did breach it, have already been fixed by them and they have made their bed and they must lie on it and therefore we object to counsel putting in any evidence tending to show any damages other than the damages that have been fixed in the contract.

Mr. SEABURY.—I direct your Honor's attention to a paragraph of this contract, which is the substance of the suit, Plaintiff's Exhibit "A," which says that: the seller hereby acknowledges [86] receipt of ten thousand dollars, United States currency, in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so, he shall forfeit the amount or amounts advanced under this contract. I observe that there is a period at that place. There was no statement of any kind of limitation to the effect that in no event could the defendant in this case, namely, the seller, be prejudiced by a breach of contract in excess of ten thousand dollars. We think that the following clause is of a different character. The following is this: The seller agrees to pay two dollars in addition to re-

turning the forfeit on each head he fails to deliver on this contract, which shall constitute an entire claim for damages. In other words, the limitation on the recovery in this section was placed not on the seller, but on the buyer; and it was expressly provided by the contract that in no event should the seller recover more than two dollars per head for each head of cattle that was undelivered under the contract, plus the return of the two dollars per head out of the ten thousand dollars already received. I think there is just that difference between the two clauses. By the contract it is expressly limited that the entire claims for damages, as the expression goes, so far as the buyer is concerned, but so far as the seller is concerned, there is nothing in the contract to limit him from recovering the actual damages sustained over and above the ten thousand dollars. At this time I would like to make this one other point, if the Court please, so that the Court may not misunderstand our position. We claim that so far as the ten thousand dollars is concerned, we don't have to establish actual damages to entitle us to retain the ten thousand dollars under the contract. That was the sum which the plaintiff fixed and agreed should be held if he failed to perform. If the jury finds that he failed to perform without proof of actual damage, [87] we claim to be entitled to retain the ten thousand dollars. If we sustained actual damages, we claim the right to recover such excess over and above the ten thousand dollars as were actually sustained as damages by the defendant in this case, and not exceeding seventy-three hundred dollars in

excess of the ten thousand dollars.

The COURT.—That amount, ten thousand dollars, is to be held in liquidation of damages suffered by the seller if the buyer fails to perform the contract?

Mr. SEABURY.—The object was to absolutely assure the defendant.

The COURT.—I think that the \$10,000 was in full of all liquidated damages and I sustain the objection.

Mr. SEABURY.—We except. For the purpose of hurrying this trial, if your Honor please, may I make an offer to prove the allegations contained in the counterclaim, to which this objection was made, which was what I was about to do. Counsel objects to any evidence under the counterclaim. (To counsel for the plaintiff.) Am I right?

Mr. KNOLLENBERG.—Any evidence in support of the counterclaim.

The COURT.—For the purpose of the record, is that a formal introduction of evidence in support of that?

Mr. SEABURY.—There may be a question as to that, and in view of the undisputed fact that Mr. Knollenberg's objection was to all evidence offered in support of the counterclaim, I prefer to have a record which would protect the defendant in that respect.

The COURT.—All right.

Mr. SEABURY.—We now offer to prove in support of the counterclaim the allegations in the amended answer of the defendant, the allegations contained in that portion of the answer which I understand counsel for the plaintiff objects to upon

the ground that it is inadmissible under the contract which is the subject of the suit.

Mr. KNOLLENBERG.—Upon the ground particularly that the basis of [88] the counterclaim is the written contract, which provides for liquidated damages, and which he admits in paragraph 14 of his amended answer are liquidated damages, and under the admission in paragraph 14 and the contract there can be no recovery for any other damages.

The COURT.—Have you finished?

Mr. SEABURY.—Yes, your Honor.

The COURT.—Sustained.

Mr. SEABURY.—We except.

XII.

The Court erred in holding and deciding that the amount of damages which the defendant might recover of and from the plaintiff was limited to the sum of Ten Thousand (\$10,000) Dollars, and in holding that such construction of the contract sued upon was affected by the question—At whose suggestion and request the written clauses of the contract sued upon were inserted, and in sustaining plaintiff's objection to the question, as follows:

Q. Will you tell whether or not any of the terms of the contract which appear to be in writing were so made at the suggestion of yourself or Mr. Myers?

Mr. KNOLLENBERG.—We object to the question. It makes no difference at whose suggestion it was made. It was made and the contract speaks for itself. It is agreed to by the parties to the contract and by the pleadings. We are bound by our pleadings. They admit we are bound, and admit that they

are bound, and it would make no difference who made the suggestions.

Mr. SEABURY.—I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the handwriting of the defendant would be more strictly construed against that party. Now, if that is the case, [89] I desire to examine this witness for the purpose of showing that the changes in this contract were made at the suggestion of the other party, namely, Mr. Myers, which would entirely dissipate that burden upon the defendant.

Mr. KNOLLENBERG.—I think that counsel would be right, if he brings that knowledge home to the plaintiff, but if he does not, I think we are bound by what the contract says, regardless of what Mr. Myers and Mr. Kibbey said outside. No verbal agreement made at the time or previous to this contract would vary or affect us in any respect, except, of course, if they made a contemporaneous agreement that would also be a binding contract. That would change it.

Mr. SEABURY.—Of course, we don't wish to show any modification of the agreement, your Honor. The rights of Mr. Hall can be no better than the rights of Mr. Myers, and in view of the rule of construction which has been urged against us, it seems to me we have a right to explain the circumstances under which the clauses were inserted, for the purpose of showing, if possible, that the responsibility and burden for these clauses did not necessarily rest with the defendant.

The COURT.—Well, I think, regardless of who may have written them or at whose suggestion they were incorporated in the contract, that the amount of damages which the defendant might recover was limited to ten thousand dollars. I sustain the objection.

Mr. SEABURY.—I except.

XIII.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to its witness Elias for the reasons set forth below, as follows:

Q. What, if anything, was said between you and Mr. Oliver with [90] reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?

Mr. STONEMAN.—We object to the question, if your Honor please, for the reason that it does not appear that what Mr. Myers was going to do was binding upon this plaintiff; that Mr. Myers was acting in any capacity that would bind the plaintiff. For that reason it is incompetent and irrelevant.

Mr. SEABURY.—I direct your Honor's attention to Plaintiff's Exhibit "B," the contract between Mr. Meyers and Mr. Hall, which is as follows: "It is also mutually understood and agreed that the said E. W. Myers or E. M. Tankersley, his agent, shall be on the ground at the time of delivery of all cattle, and aid and assist in receiving said cattle."

Mr. STONEMAN.—That does not change the contract at all in any way. If it is relevant at all, it is a matter personally between ourselves and Myers and Tankersley.

Mr. SEABURY.—We think it relevant, if your Honor please, to show what Mr. Tankersley's position was. It shows that either one of them was to be there and aid and assist Mr. Hall or his assignee in receiving the cattle.

The COURT.—What did you ask?

Mr. SEABURY.—What, if anything, was said about the function to be performed by Myers or Tankersley on receiving these cattle?

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

XIV.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to its witness Elias, by which defendant proposed to elicit testimony of a conversation had by said witness in the presence of plaintiff for the reasons set forth below, as follows: [91]

Q. Tell us what took place after you left Nogales to go out there to see these cattle.

A. Nothing that I can remember on the road until we got there. We got the men to gather the herd, and I asked Mr. Hall to go ahead and cut the herd of cattle to satisfy himself. Well, they went in there and looked around for a little while, and then he come out and he says, he started to tell me there was too many unmerchantable cattle, that they weren't cattle according to contract. At that time Mr. Myers was present, and I told Mr. Myers—

Mr. STONEMAN.—We object to any conversation between this witness and Mr. Myers as not binding upon this plaintiff.

Mr. SEABURY.—In the presence of the plaintiff, if your Honor please, with reference to this very matter.

The COURT.—Well, I don't think any statement made by Myers would be binding on this plaintiff.

Mr. SEABURY.—Notwithstanding that Mr. Myers is the assignor of the plaintiff, if your Honor please?

The COURT.—Yes, notwithstanding that fact. After he sold this contract to the plaintiff and the plaintiff had assumed all the burden and was to reap all the benefit. I do not think that any statement made by Mr. Myers would be binding upon the plaintiff, nor do I think that any construction that Mr. Myers may have placed upon the contract would be binding upon the plaintiff.

Mr. SEABURY.—Nor any admissions made by Mr. Myers?

The COURT.—Nor any admissions made by Mr. Myers.

Mr. SEABURY.—The objection is sustained.

The COURT.—Yes, I sustain the objection.

Mr. SEABURY.—May I except. May I also except to your Honor's construction of the matter with reference to any admissions made by Mr. Myers with reference to this matter as not being binding upon plaintiff?

The COURT.—Yes. [92]

Mr. SEABURY.—May I ask whether this contract between Myers and Hall is in evidence—it is, is it not? Plaintiff's Exhibit "B."

Mr. STONEMAN.—Yes.

The COURT.—When I say that any admission made by Mr. Myers should not be received, I mean any admission made by him after the assignment by him to Mr. Hall of the contract in question, not admissions made theretofore.

Mr. SEABURY.—May I still reserve my exception to your Honor's ruling as modified?

The COURT.—Yes.

Mr. SEABURY.—I do not wish to burden your Honor with it, but I wish to direct your Honor's attention to the part of the contract which makes Mr. Myers or Mr. Tankersley agent of Hall for the very purpose of being there at that time.

The COURT.—The plaintiff has not objected to his being there. What they object to is the admission or statements alleged to have been made by Mr. Myers.

XV.

The Court erred in overruling defendant's objection to the questions propounded to defendant's witness Joffroy by plaintiff upon cross-examination, upon the ground that the said questions and the testimony elicited was incompetent and immaterial to the issues in this case and not proper cross-examination, as follows:

Q. You would not expect people to order cars unless they had a use for them, would you? Now, Mr. Witness, isn't it customary when cars are ordered, and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground

106 *Alamo Cattle Company, Sociedad Anonima*,
that the proof [93] of custom is not admissible—
not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Q. Have you ever known people, anyone else besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.

Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove that or disprove that issue.

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain date to cancel that order and reorder in the event they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

XVI.

The Court erred in overruling the defendant's ob-

jection to the question propounded by plaintiff's counsel to defendant's witness Myers on his cross-examination on the grounds stated below, as follows:

Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract: [94] That the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two-year old steers, and four dollars a head for the four year-old steers only in case they are delivered?

Mr. SEABURY.—Now, we object to that, if your Honor please, upon the ground that such testimony requires Mr. Myers to construe as a question of law the effect of the contract between him and Mr. Hall, and upon the ground that it is incompetent and not within the issue of this controversy and not tending to establish any interest of Mr. Myers in this case.

The COURT.—Objection overruled.

A. Yes, sir.

XVII.

That the evidence was insufficient to justify and support the verdict of the jury, among other things, for the reason that there was no evidence establishing the readiness and ability of the plaintiff to perform his part of the contract after May 9th and before May 12th, 1913; but, on the contrary, the uncontradicted evidence was the sole ability of the plaintiff Hall to perform his part of the contract resulting from his sale of the cattle to Clay, Robinson and Company by and through a representative of Clay, Robinson and Company, namely, the witness Johnston, and that the said Johnston refused to accept

the said cattle on May 9th, from which it follows that on May 12th, 1913, the plaintiff was not ready, willing or able to perform his part of the contract sued upon.

XVIII.

That the learned Court further erred in denying the motion of the defendant made at the close of the plaintiff's case for a directed verdict in its favor, and also in denying the renewal of said motion duly made by defendant's counsel at the close of all [95] of the evidence, upon the ground that the plaintiff's evidence showed that prior to the commencement of suit and about the 12th of May, 1913, the defendant had made and entered into a valid contract with the plaintiff for the purpose of compromising the dispute which then and there existed between the plaintiff and the defendant, with reference to the contract sued upon herein and for the purpose of superseding and abrogating the contract sued upon, for the reason that such proof constituted a fatal variance with the pleadings in said cause; and upon the ground of said variance and because the plaintiff had proved a cause of action not alleged in the complaint, which was in reality a substitute for the cause of action sued upon, the plaintiff was not entitled to a verdict and defendant was entitled to judgment, directing a verdict in its favor against the plaintiff, to which rulings defendant duly excepted.

XIX.

The Court erred in declining and refusing to charge the jury as duly requested by defendant in writing, which request was duly submitted to the

Court before the close of the evidence and before the Court charged the jury, as follows:

Defendant's Written Request No. 2.

By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to deliver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good as or better than Terrazas cattle.

To which ruling defendant duly excepted.

XX.

The Court likewise erred in refusing to give defendant's written request No. 3, so presented to the Court as aforesaid: [96]

Defendant's Written Request No. 3.

But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant fifteen (15) days' notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars.

To which ruling defendant duly excepted.

XXI.

The Court likewise erred in refusing to give defendant's written request No. 4, so presented to the Court as aforesaid:

Defendant's Written Request No. 4.

I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and to pay for them when they were placed on board of the cars furnished by the plaintiff.

To which ruling defendant duly excepted.

XXII.

The Court likewise erred in refusing to give defendant's written request No. 10 so presented to the Court as aforesaid:

Defendant's Written Request No. 10.

If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three hundred (\$7,300) dollars in addition, the defendant is entitled to recover from the plaintiff by way of counterclaim. [97]

To which ruling defendant duly excepted.

XXIII.

The Court likewise erred in refusing to give defendant's written request No. 11 so presented to the Court as aforesaid:

Defendant's Written Request No. 11.

In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such

sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage, if any were sustained by it, over and above the said ten thousand (\$10,000) dollars by reason of the plaintiff's breach of the contract.

To which ruling defendant duly excepted.

XXIV.

The Court likewise erred in refusing to give defendant's written supplemental request No. 1 so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 1.

If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrazas cattle, and that plaintiff refused to receive them, then you must find a verdict for the defendant.

To which ruling defendant duly excepted.

XXV.

The Court likewise erred in refusing to give defendant's written supplemental request No. 2, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 2.

[98]

I further charge you that the provision in the contract which required the buyer to give 15 days' notice before the delivery of each shipment was a provision for the benefit of the seller.

To which ruling defendant duly excepted.

XXVI.

The Court likewise erred in refusing to give defendant's written supplemental request No. 3, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 3.

I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer during April or May, 1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.

To which ruling defendant duly excepted.

XXVII.

The Court likewise erred in refusing to give defendant's written supplemental request No. 4, as presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 4.

I further charge you that it was not contemplated by the terms of the contract sued upon, that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to [99] deliver all the cattle under the contract in one shipment or at one time, pursuant

to the notice contained in plaintiff's telegram dated May 14th.

To which ruling defendant duly excepted.

XXVIII.

The Court likewise erred in refusing to give defendant's written supplemental request No. 7, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 7.

I further charge you that, even if you find that the cattle tendered to plaintiff, on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready willing and able to perform his part of the contract, then you must find for the defendant.

To which ruling defendant duly excepted.

XXIX.

The learned Court further erred in giving, at the request of the plaintiff, over the exception duly taken by the defendant, the plaintiff's written request No. 5, as follows:

Plaintiff's Written Request No. 5.

You are also instructed that the burden of proof is upon the Alamo Cattle Company before they can recover judgment against the plaintiff, to show that the cattle alleged to have been tendered on May 9th and May 12th, 1913, fully complied with the contract in every respect.

And also in giving plaintiff's written request No. 7 as modified by the Court:

114 *Alamo Cattle Company, Sociedad Anonima,*
Plaintiff's Written Request No. 7 as Modified by the
Court.

You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from [100] the defendant dated May 13, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.

To all of which defendant duly excepted upon the ground that the burden of proof is on the plaintiff to show a breach of the contract by the defendant, and as to said latter charge, upon the ground that said charge is incomplete in that it justifies the plaintiff in treating the contract as at an end without requiring proof on his part that he had performed the conditions of the contract to be by him performed up to the time of the breach of the contract and that he was ready, willing and able to perform the contract on his part.

XXX.

The Court further erred in charging the jury upon its own motion :

You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In

other words, the plaintiff is not under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.

To which defendant duly excepted, upon the ground that such instruction placed an erroneous construction upon the terms and provisions of the contract sued upon, and in effect relieved the plaintiff of the necessity of accepting a train-load [101] of cattle which were in all respects in accordance with the terms of the contract, provided such train-load of cattle could have been cut from the herd of cattle tendered by the defendant to the plaintiff; and upon the further ground that it permitted the jury to find a verdict for the plaintiff even though the jury might have found that there were only a few unmerchantable cattle, unsubstantial in amount in the herd of cattle so tendered to the plaintiff, and relieved the plaintiff of his obligation and duty under such circumstances to point out and designate to the defendant which, if any, of such cattle were claimed by him to have been unmerchantable, and for that reason unacceptable to him under the terms of said contract; and withdrew from the jury the right to find that notwithstanding the presence in the herds so tendered by defendant to plaintiff of one or more cripples or other unmerchantable cattle, that in reality the defendant substantially performed its

contract with the plaintiff by tendering a full train-load lot of good and merchantable cattle under and pursuant to and in strict accordance with the terms of the contract sued upon.

XXXI.

The Court further erred in instructing the jury as follows:

You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.

You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than [102] to accept such contract cattle in train-load lots, provide cars for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all duties and expenses on board cars at Nogales, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.

The contract makes the payment of the balance of

the purchase price payable when the cattle are delivered on the cars and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff's right of recovery in this action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event, the plaintiff need not show his readiness and ability to perform the contract.

Gentlemen, I repeat; the contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff's right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

You will observe that the contract provides that the buyer was required to give 15 days' notice for each delivery of cattle in train-load lots during the months of April and May, 1913, furnished the cars at Nogales, Arizona, to receive the cattle [103] and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and testimony in this case, it is shown that the cattle variously estimated at from one thousand to

fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers, of the brands, ages, grades, and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues are the main issues to be submitted to you, for your determination.

I think, gentlemen, I will repeat that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, was not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor

was able to or did guarantee the payment [104] of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th, were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract—whether or not the plaintiff was justified in his refusal to take the cattle.

If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank at Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plaintiff the cattle called for in the contract, in

the quantity and of the ages specified and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.

Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 12th, [105] 1913, then it is not material to inquire whether or not the defendant, the Alamo Cattle Company, loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the Bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales, Arizona. In other words, it was the duty of the defendant upon receipt of 15 days' notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o. b., cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract, and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if the plaintiff declined or refused to receive same, then it is not

necessary in this case that the defendant should go further and show that the cattle were delivered f. o. b. cars at Nogales Station, all duties and expenses paid.

On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.

To all of which the defendant duly excepted on the ground [106] that such instructions withdraw from the consideration of the jury, the question of whether the plaintiff was in reality willing and able to perform the contract upon his part prior to any breach of the contract upon the part of the defendant, which question is a question of fact for the jury to decide.

XXXII.

The Court erred in overruling defendant's motion for a new trial for the reasons averred above in the more specific assignment of errors herein contained.

WHEREFORE, the defendant prays that for said manifest errors the judgment of the Court should be reversed.

FRANK J. BARRY,
WILLIAM M. SEABURY,
Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona.

122 *Alamo Cattle Company, Sociedad Anonima,*

John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Assignment of Errors. Filed June 24, A. D. 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [107]

*In the District Court of the United States for the
District of Arizona.*

O.K.—GJS.

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Alamo Cattle Company, Sociedad Anonima, as principal, and L. J. F. Iaeger and Fred Rondstadt, as sureties, are held and firmly bound unto John G. Hall, defendant in error, in the full sum of One Thousand Dollars, the sum being the amount of the bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said court on June 24, 1914, to be paid to the said John G. Hall, defendant in error, his heirs, legal representatives or assigns, to which payment well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, on the 29th day of May, 1914, at the District Court of the United States for the District of Arizona, in a suit pending in said court between John G. Hall, plaintiff, and the Alamo Cattle Company, Sociedad Anonima, defendant, a judgment was rendered in favor of the plaintiff and against the said Alamo Cattle Company, Sociedad Anonima, for the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars and costs of action, and the said Alamo Cattle Company, Sociedad Anonima, has obtained a writ of error to reverse said judgment in the aforesaid action and filed a copy thereof in the clerk's office of said court, and a citation directed to the said John G. Hall, plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth [108] Circuit, to be holden at San Francisco, State of California;

Now, the condition of the above obligation is such that if the said Alamo Cattle Company, Sociedad Anonima, shall prosecute its said writ of error to effect and answer all costs if it fail to make said plea good, then the above obligation to be void, else to remain in full force and effect, and the said sureties agree that in case of a breach of any condition hereof said Court may, upon notice to them of not less than ten days, proceed summarily in this action to ascertain the amount which said sureties are bound to pay on account of such breach and render judgment

124 *Alamo Cattle Company, Sociedad Anonima,*
therefor against them and award execution there-
for.

ALAMO CATTLE COMPANY, SOCIEDAD
ANONIMA.

By W. BECKFORD KIBBEY, Jr.,
President.

L. J. F. IAEGER.

FRED RONDSTADT.

The above and foregoing bond approved this 25th
day of June, 1914.

GEORGE W. LEWIS,
Clerk.

By Effie D. Botts,
Deputy Clerk. [109]

*In the District Court of the United States for the
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Justification of Surety.

State of Arizona,
County of Pima,—ss.

I, L. J. F. Iaeger, being duly sworn, say that I re-
side at Tucson, in the County of Pima, State of
Arizona, and am over the age of twenty-one years;
that I desire to act as one of the sureties of the
Alamo Cattle Company, Sociedad Anonima, on the
One Thousand Dollar (\$1,000) appeal bond to be

executed by said company and two sureties herein; that I am worth, over and above all debts due by me and free and clear of all incumbrances of whatsoever nature, more than the sum of One Thousand Dollars.

L. J. F. IAGER.

Sworn to before me this 25th day of June, 1914.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,

Deputy Clerk. [110]

*In the District Court of the United States for the
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Justification of Surety.

State of Arizona,

County of Pima,—ss.

I, Fred Rondstadt, being duly sworn, say that I reside at Tucson, in the County of Pima, State of Arizona, and am over the age of twenty-one years; that I desire to act as one of the sureties of the Alamo Cattle Company, Sociedad Anonima, on the One Thousand Dollar (\$1,000) appeal bond to be executed by said company and two sureties herein; that I am worth, over and above all debts due by me and

126 *Alamo Cattle Company, Sociedad Anonima*,
free and clear of all incumbrances of whatsoever nature,
more than the sum of One Thousand Dollars.

FRED RONSTADT.

Sworn to before me this 25th day of June, 1914.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,

Deputy Clerk.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Bond. Filed June 25, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [111]

*In the United States District Court for the District
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Order [Extending Time to File Bill of Exceptions].

It appearing by the stipulation attached hereto, dated June 26th, 1914, signed by the attorneys for the plaintiff and the defendant, that the consent of the plaintiff has been obtained for the entrance of this Order;

It is hereby ordered, that the time in which the defendant may file its Bill of Exceptions in the

above-entitled cause is extended to and including the 15th day of July, 1914.

Dated Tucson, Arizona, June 27th, 1914.

WM. H. SAWTELLE,
Judge.

*In the District Court of the United States in and for
the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

**Stipulation [for Extension of Time to File Bill of
Exceptions].**

It is hereby stipulated and agreed that the defendant's time in which to file its proposed bill of exceptions in the above-entitled cause be, and the same hereby is, extended to and including July 15, 1914.

It is further stipulated and agreed that an order to this effect may be entered herein without further notice to the parties, and that defendant above named have the same right to make said motion for a new trial and file said bill of exceptions within the time herein stated with the same force and effect as though said matters had been done and performed

128 *Alamo Cattle Company, Sociedad Anonima,*
in the present term of the District Court of the
United States.

LOOMIS & KNOLLENBERG,
STONEMAN & LING,

Attorneys for Plaintiff.

FRANK J. BARRY,
WILLIAM M. SEABURY.

Attorneys for Defendant.

Dated June 26th, 1914.

[Endorsements]: No. 10 (Tucson). In the United
States District Court for the District of Arizona.
John G. Hall, Plaintiff, vs. Alamo Cattle Company,
Sociedad Anonima, Defendant. Order and Stipu-
lation. Filed June 27th, A. D. 1914. George W.
Lewis, Clerk. By Effie D. Botts, Deputy Clerk.
[111½]

*In the United States District Court for the District
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 22d day of
May, A. D. 1914, at a regular and stated term of the
United States District Court for the District of
Arizona, before the Honorable William H. Sawtelle,
Judge of the above-entitled court, the issues joined
by the pleadings in said cause came on to be tried

by said Judge and a jury impanelled and sworn to try the issues in said cause.

Plaintiff was represented by Messrs. Stoneman and Ling and Messrs. Loomis and Knollenberg, his attorneys, and the defendant was represented by Mr. William M. Seabury and Mr. Frank J. Barry, its attorneys.

The complaint and answer being read to the jury by counsel, thereupon the following further proceedings were had herein, to wit:

On motion of plaintiff's counsel and without objection the complaint was amended upon order of the Court by substituting the word "train-load" for the word "carload" in paragraph 6, page 6, line No. 33 of the complaint, and by inserting the words "and did comply" after the word "with" in paragraph 6, page 6, line 9 of the complaint.

Mr. STONEMAN.—We offer in evidence the original of the contract sued upon, which is admitted to be the contract by the answer [112] and ask that it be marked Plaintiff's Exhibit "A."

No objection made.

The COURT.—It may be received and marked admitted.

[**Testimony of John G. Hall, in His Own Behalf.**]

JOHN G. HALL, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I am the plaintiff, John G. Hall, and am acquainted with Ed. W. Myers, and with the terms of Plaintiff's Exhibit "A." I purchased the contract described

(Testimony of John G. Hall.)

in said Exhibit "A" from Myers and assumed the obligation of carrying out that part of the contract in so far as it related to Myers. The assignment was in writing.

Q. I hand you what purports to be a written assignment of that contract and ask you whether or not that is the assignment which you refer to being made in writing. A. Yes, sir, it is.

Q. Are you acquainted with the signature of E. W. Myers? A. Well, I can't say that I am.

Q. Are you acquainted with the signature of K. D. Oliver? A. Yes, sir.

Mr. STONEMAN.—We offer in evidence and ask that it be marked Plaintiff's Exhibit "B," assignment which was presented to the witness.

Mr. SEABURY.—On counsel's statement that there is a copy of that attached to the complaint, we have no objection.

The COURT.—It may be received and marked Plaintiff's Exhibit "B."

The first steps taken under the contract were that the Alamo Cattle Company first notified us by letter that they would have these cattle ready at a certain date, and we notified them by letter we would be there to receive them.

Mr. K. D. Oliver was my agent for the purpose of dealing with the Alamo Cattle Company with respect to these [113] cattle.

Q. I'll ask you if you received from the Alamo Cattle Company a letter purporting to have been written by W. Beckford Kibbey, dated April 25th,

(Testimony of John G. Hall.)

which I now hand you. A. Yes, sir.

Mr. STONEMAN.—We offer it in evidence and ask that it be marked Plaintiff's Exhibit "C," the letter just handed to the witness.

Mr. SEABURY.—No objection.

Received and marked Plaintiff's Exhibit "C."

Q. Did you reply to that letter, Mr. Hall?

A. Yes, sir.

Mr. STONEMAN.—I ask counsel on the other side if they have the original of a letter written April 28th, 1913, addressed to W. Beckford Kibbey, Jr., First National Bank, signed by K. D. Oliver, Manager.

Mr. SEABURY.—I'll raise no objection to the copy as secondary evidence, Mr. Stoneman.

Mr. STONEMAN.—Upon the stipulation of counsel, we now offer in evidence copy of letter, the original of which was signed by K. D. Oliver as manager, dated on the 28th of April, 1913, addressed to W. Beckford Kibbey, Jr., and ask that it be marked Plaintiff's Exhibit "D."

Received and marked Plaintiff's Exhibit "D."

Mr. STONEMAN.—If your Honor please, at this time I ask leave to read these letters to the jury.

The COURT.—You may do so.

(Mr. Stoneman reads exhibits to jury.)

Mr. STONEMAN.—I ask counsel for defendant if you have in your possession original of telegram purporting to have been sent from El Paso, Texas, on May 3d, 1913, addressed to the Alamo Cattle Co., First National Bank, Nogales, Arizona, signed K. D. Oliver.

132 *Alamo Cattle Company, Sociedad Anonima*,
(Testimony of John G. Hall.)

Mr. SEABURY.—No objection. [114]

Mr. STONEMAN.—By stipulation of counsel, I offer in evidence and ask that it be marked Plaintiff's Exhibit "E," carbon copy of telegram of May 3d, 1913, which I understand is admitted by counsel to have been received by the addressee at Nogales.

Mr. SEABURY.—Yes.

The COURT.—It may be received.

Mr. STONEMAN.—Under the same stipulation, I offer in evidence and ask that it be marked Plaintiff's Exhibit "F," a telegram addressed to K. D. Oliver, El Paso, Texas, signed by Alamo Cattle Company, dated May 3d, which under the stipulation, I understand, was sent by the Alamo Cattle Company and received by K. D. Oliver.

Mr. SEABURY.—That is correct.

The COURT.—It may be admitted.

(Mr. Stoneman reads exhibits to jury.)

Mr. STONEMAN.—By stipulation of counsel, we offer in evidence and ask that it be marked by proper designation copy of telegram dated May 4th, El Paso, addressed to Alamo Cattle Company, signed K. D. Oliver, under stipulation that it was sent by K. D. Oliver, and received by defendant in due course.

Mr. SEABURY.—May I ask, if your Honor please, if counsel will extend the same courtesy to us? Under proofs on similar character.

Mr. STONEMAN.—Assuredly. Unless in the event we have the original.

(Testimony of John G. Hall.)

Received and marked Plaintiff's Exhibit "G."

Mr. STONEMAN.—Under the same stipulation, we offer in evidence copy of telegram dated May 5th, 1913, addressed to K. D. Oliver, El Paso, Texas, signed Alamo Cattle Company, under agreement that it was sent by the Alamo Cattle Company and received by K. D. Oliver.

Received and marked Plaintiff's Exhibit "H."

(Mr. Stoneman reads exhibits to jury.) [115]

Mr. STONEMAN.—We offer in evidence the original of a telegram dated Nogales, May 7th, 1913, addressed to K. D. Oliver, El Paso, Texas, signed Alamo Cattle Company, by stipulation of counsel that the telegram was sent by the Alamo Cattle Company, and received by K. D. Oliver in due course.

Received and marked Plaintiff's Exhibit "I."

Mr. STONEMAN.—And also under the same stipulation as to the sending and receipt we offer and ask that it be marked Plaintiff's Exhibit "J," a copy of telegram dated El Paso, May 8th, 1913, addressed to Alamo Cattle Company, signed K. D. Oliver.

Received and marked Plaintiff's Exhibit "J."

(Mr. Stoneman reads exhibits to jury.)

(Recess until Tuesday, May 26th, at 10:00 A. M.)

Be it further remembered that thereupon the plaintiff introduced the following evidence in said case, that is to say:

Tuesday, May 26, 1914.

At 10:00 A. M. this day both parties being present, the plaintiff in person and by his counsel and

(Testimony of John G. Hall.)

the defendant by its counsel, the jurors returned into court and thereupon the following further proceedings were had herein, to wit:

JOHN G. HALL, recalled as a witness in his own behalf, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I am a citizen and resident of the State of Colorado, and was such when this suit was filed. I first saw the cattle which were to be delivered under this contract about May 13th, when I went out from Nogales in company with Mr. Oliver, Mr. Gillespie, and Ramon Elias to look at a bunch of cattle, which they claimed they were tendering me under the contract. I think there were about 1100 in the bunch. I didn't count them myself, [116] but they represented to me that they had about 1100 in the bunch. I have been familiar with the grade of cattle known as the Terrasas brand for the last fifteen years. They are a fair grade of Mexican cattle and are acknowledged by dealers over the country generally as a standard by which Mexican cattle are judged or compared with. They are to a certain extent bred up. Principally I think with short-horn bulls purchased from the Corralitos herd and the Forman herds in Chihuahua. That bunch of cattle was not as good as the Terrasas cattle by several dollars per head. They were not as large, not as well grown, not as uniform, not as heavy-boned as Terrasas cattle. I did not examine those cattle for brands at that

(Testimony of John G. Hall.)

time. I can't say that I paid much attention to brands. It was the quality of the cattle that interested me more than the brands did. I was looking for the quality of the cattle more than anything else. I had a conversation with Mr. Elias at that time while we were in the herd; we were in the herd on horseback. I think, I am pretty sure that Mr. Oliver was within hearing distance when the conversation occurred, but I wouldn't be positive about that. When I first got to the herd, I asked him what he was doing with so many yearlings in the herd. He said that they were sold to another party, and that whatever I cut out there that I didn't want, he was going to turn over to this other man, and I called his attention to the fact that the herd was nearly half yearlings, and that if I did go to work to trim on the cattle—I asked him why he didn't have his cattle that he was tendering me on the contract trimmed out where I could look at them, without having them mixed up with the other cattle, and he said they hadn't had time to do that after I had gotten out there, and I asked him to do it, and he demurred a little bit, and Mr. Myers was present, also, and Mr. Myers asked me if I wouldn't go in and cut out what I could use of the cattle. So they gave us some horses, and Mr. [117] Oliver and I went in and cut out 35 or 40 head of these cattle such as we could accept under the contract, and Ramon, Mr. Elias, came in and stopped us. He says, "If that's the kind of cattle you want," he says, "we haven't got them here." I says, "I know you

(Testimony of John G. Hall.)

haven't got them." I said, "I told you that on the first start that there wouldn't be over not to exceed 450 to 500 head of cattle that would be two years old after yearlings, stags, cripples, and bulls, cattle that were sore-footed and too thin and *in condition* to ship, were cut out, and we couldn't accept them except in train-loads.

Q. How long have you been in the cattle business, Mr. Hall? A. Since 1879.

Q. What, if anything, did Mr. Elias say with reference to the cattle which at that time you testified you pointed out to him as not being as good or better than Terrasas cattle?

A. He said he had never seen the Terrasas cattle, and wasn't in position to know.

Mr. SEABURY.—I don't understand that he has so testified, your Honor. I think that counsel ought to ask the witness what the conversation was fully without leading him particularly to special items in the alleged conversation. He started to give the conversation, and I thought he had given it all. If he has not, I think he should be requested to state it all, instead of some portion of it.

Mr. STONEMAN.—If your Honor please, I don't understand the objection is interposed upon any known ground that would permit of the Court considering it.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

When they asked me to cut out such cattle as I would receive, I cut out about thirty-five or forty

(Testimony of John G. Hall.)

head to a little bunch, and, "Now," I says, "I don't consider those cattle as good as Terrasas cattle, and besides that, these I have cut out are not all two years old," and I went back again and cut back some seven or eight [118] head of them which were not two years old. We examined them, and I found that they were not two years old, and looked at their mouths. After I had cut out these 35 or 40 head, Ramon came in and told me it was no use going any further, that he couldn't get a train-load of cattle out of there of that kind I was cutting. I said, "I know that," and I says, "What do you want to do about it?" "Well," he says, "I don't know what to do." He says, "I can't give you an answer until we go back to town and see Mr. Kibbey." We discussed the matter with Mr. Kibbey after we got back to town. We had considerable controversy over the matter and parleyed back and forth and tried to make some compromise of the deal. Mr. Kibbey offered to retain \$4,000 of my advance money and return me \$6,000, provided I would wait 30 or 60 days for the \$6,000. This I refused. Finally I made him a proposition. The reason he gave me for asking the time on this payment was that he didn't have the money on hand to pay me. Then I made him another proposition, that if he would deliver me a thousand head of four year old steers in the fall, and give me a contract to that effect at \$32 a head, and give me a contract, and give me a receipt for \$10,000 paid on the new deal, that I would call the deal off and he agreed to do it.

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(Testimony of John G. Hall.)

Mr. SEABURY.—We move to strike out “that he agreed to do it” and that the witness be required to state what he said.

The COURT.—That objection is sustained. That statement “that he agreed to do it.” That is a conclusion.

Q. What did he say? You say he agreed to do it. The Court has ruled that that is a conclusion. What did he say?

A. He said that would be satisfactory to him, or words to that effect. We received a letter or telegram on or about May 13th, from the Alamo Cattle Company with reference to this contract.

Q. I hand you a letter dated May 13th, postmarked Nogales, addressed to you, purporting to be signed by the Alamo Cattle Company [119] by W. Beckford Kibbey, Jr., and ask you if you received that letter.

A. Yes.

Mr. STONEMAN.—We offer in evidence, if the Court please, this letter and ask that it be marked Plaintiff’s Exhibit by proper designation.

Mr. SEABURY.—No objection.

Received in evidence and marked Plaintiff’s Exhibit “K.”

Exhibit read to jury.

Q. I ask you if you sent a telegram to the Alamo Cattle Company under date of May 14th, 1913, in words and figures as shown by this carbon copy of the purported telegram. A. Yes, sir, I did.

Mr. STONEMAN.—We offer in evidence a carbon copy of telegram as described to the witness and ask,

(Testimony of John G. Hall.)

under the stipulation of counsel to the effect that it was sent and received by the defendant in due course, that it be admitted.

Mr. SEABURY.—We admit the receipt and sending of the telegram.

Received in evidence and marked Plaintiff's Exhibit "L."

Exhibit read to jury.

I think I received an answer to that telegram from the Alamo Cattle Company; I am not positive about it. The Alamo Cattle Company did not deliver to me any cattle of the grade, character, quality and in the numbers required under the contract in response to that telegram. They didn't tender me any.

Q. Did the Alamo Cattle Company at any time tender or offer to you cattle as good or better than Terrasas cattle, which after cutting runts, stags, cripples, lump-jaws, sway-backs, blinds and unmerchantable cattle, would permit a train-load to be made after deducting therefrom a cutting of fifteen per cent?

Mr. SEABURY.—We desire to object to that upon the ground that the question is improper in form—assumes fact not offered in evidence, for instance, of what a train-load consists with respect to cattle; also upon the ground that there is no evidence that [120] the plaintiff exercised the privilege of cutting, so that it is impossible to determine whether the cattle came up to the required standard after he exercised that privilege.

The COURT.—Objection overruled.

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(Testimony of John G. Hall.)

Mr. SEABURY.—Except.

The COURT.—Answer the question.

A. They did not. The number to a car that cattle of the size and quality as good as or better than Terrasas cattle would load would depend on the size of the car. An ordinary forty-foot Santa Fe car, they would load fifty to the car without crowding. In a thirty-six foot car they would load about forty-four or forty-five head. Fifteen cars are ordinarily considered on the railroad going into Nogales as a train-load of thirty-six or forty-foot cattle cars. That is the ordinary train-load. That is the number of cars of those dimensions which are considered by cattle shippers and cattle buyers in that vicinity as constituting a train-load. That would make, then, somewhere between 650 and 750 head of cattle to an ordinary train-load. Depending on the length of the cars.

Q. On the 11th day of May, 1913, did you send E. W. Meyers a telegram in words and figures as shown by the carbon copy of the purported telegram I now hand you? A. Yes, sir.

Mr. STONEMAN.—We offer this telegram—the carbon copy—and ask that it be permitted to be read under the stipulation heretofore obtained.

Mr. SEABURY.—We object, if your Honor please, to the offer upon the ground that it is incompetent for the reason that it purports to be a statement from Hall in the nature of a self-serving declaration, addressed to E. W. Meyers, and not the defendant, and, as such, not binding upon the defendant.

(Testimony of John G. Hall.)

(Telegram submitted to the Court.)

The COURT.—Until proof to sustain its relevancy, I sustain the [121] objection.

Mr. STONEMAN.—I ask that this be marked for identification as Plaintiff's Exhibit "N."

The COURT.—Mark it for identification.

(Telegram sent to E. W. Meyers, dated May 11th, 1913, marked Plaintiff's Exhibit "N" for identification.)

(By Mr. STONEMAN.)

Q. On May 11th, 1913, did you send a telegram to the Alamo Cattle Company in words and figures shown by the carbon copy of a telegram purported to be sent to the defendant, signed by you?

A. Yes, sir.

Mr. STONEMAN.—We offer in evidence this copy and ask that it be permitted to be read and marked as plaintiff's exhibit under the same stipulation.

Mr. SEABURY.—All right. We make no objection to its receipt.

Mr. STONEMAN.—(Reads to the jury telegram dated at El Paso, Texas, May 11th, 1913, addressed to Alamo Cattle Company, Nogales, Arizona, and signed J. G. Hall, which is received as Plaintiff's Exhibit "O.")

Q. Now, Mr. Hall, with reference to your ability to pay for these cattle in the event the contract cattle, or cattle called for and up to the amount called for in the contract have been tendered to you, were you or were you not at that time ready, willing and able to pay for a train-load of cattle?

(Testimony of John G. Hall.)

Mr. SEABURY.—We object to that, if your Honor please. We think that the question as put calls for the conclusion of the witness upon a matter which is not expert in nature, and that the witness should be required to state what, if any, financial ability he had at that time to take up the contract—not his mere conclusion that he was able to pay one hundred and twenty thousand dollars, but the fact that he was able to do so.

The COURT.—Overruled. [122]

Mr. SEABURY.—I except.

A. I was prepared and ready to receive and pay for all the cattle that they could deliver to me under the contract. I had had no preliminary conversations with the First National Bank of Nogales with reference to the manner of making the payments by me. After cattle up to the contract had been delivered to me at Nogales on board cars, all duties and expenses paid by the Alamo Cattle Company, I was ready and able to make arrangements for payment for those cattle, in train-load lots, most absolutely. As an evidence of my readiness and ability to make these payments, I state that these cattle were re-sold to Clay Robinson and Company of Denver, and they agreed to pay for the cattle through the El Paso Bank and Trust Company, and I was to check on the El Paso Bank and Trust Company, and all I had to do when the Alamo Cattle Company notified me that they had these cattle ready to cross the line was to have the First National Bank at Nogales wire the El Paso Bank and Trust Company for so much

(Testimony of John G. Hall.)

money, and they were prepared to guarantee the payment for each shipment as it showed up. We had already sold four thousand head of the two year old steers, which were under the contract with the Alamo Cattle Company. We had received eight thousand dollars under our contract with Clay Robinson and Company. I have not got that eight thousand dollars. I turned it back to Clay Robinson and Company.

Cross-examination.

(By Mr. SEABURY.)

I received the eight thousand dollars from Clay Robinson and Company, I think, somewheres about the 20th of March.

I paid it back during the summer and fall. Some I did not pay back until fall. Every cent of it is now paid back. It is not a fact that when I sold these cattle I sold the contract. I did not sell all the cattle to come under this contract from Meyers. [123] only the two year old steers. I sold the cattle at a profit of about two dollars a head—a little less than two dollars a head. James A. Johnson was the representative of Clay Robinson with whom I dealt. Mr. Oliver handled the deal, and he went with Mr. Johnson when he went to see these cattle. Mr. Oliver acted as my agent, and I could not say positively whether he showed Mr. Johnson the contract between Meyers and myself—Plaintiff's Exhibit "B"—but he was familiar with its terms. He also knew the contents of Plaintiff's Exhibit "A," the contract between the defendants and Meyers. He knew them

both, before he made this purchase from me.

It is a fact that Mr. Johnson saw the cattle at the ranches of the Alamo Cattle Company in northern Sonora, Mexico, long prior to May 14th. I was not present. He did not see them in May of 1913, when I was present. I was not there at any time when he was there. May 13th was the first time I saw these cattle that were offered to me.

Q. Whereabouts did you see them?

A. I saw them down at the ranch which Mr. Ramon Elias runs—I don't know what he calls it. About nine or ten miles from Nogales. The cattle were purchased by Mr. Johnson from me to supply an order for one of their customers. Clay Robinson and Company are commission merchants and dealers in cattle. I was financially able to take up this contract. They had never asked me to make an arrangement to pay the balance of the purchase price.

I had never made any arrangements with the First National Bank for that purpose. I don't know whether Mr. Oliver had or not. I was not handling the deal up to the time I went out there. The whole transaction was conducted by Mr. Oliver on my behalf. He was my authorized agent to do anything he wanted with reference to that transaction. I mean he had my full authority to represent me. When I was at the ranch of the defendant about May 13th, [124] 1913, I made objection to Mr. Elias, Mr. Oliver and Mr. Meyers that the cattle shown me were not as good as or better than the Terrasas cattle. I do not remember making it to anybody else. I

(Testimony of John G. Hall.)

made no financial arrangements besides those stated, which involved the El Paso Bank and Trust Company. It is a fact that my only ability to take up this contract depended on those arrangements.

I should judge that there were in that lot of cattle that I saw on the 15th of May, 1913, about eleven thousand head—I did not count them. Probably thirty-five per cent of them were as good as or better than Terrasas cattle. Well, I won't say that they were as good, but they were so nearly as good that I would have accepted them. The balance of the herd consisted of yearlings, stags and bulls, and cattle that were not in condition to ship—sore-footed, poor, looked like they had been on the trail for a week or ten days and were worn out. Under the contract I had the privilege of cutting out fifteen per cent after all of the unmerchantable cattle had been trimmed out by the sellers. I never exercised that privilege, because the herd was never put up in satisfactory shape, and it was for them to do their work first. The herd was not put in the shape that it should have been in under the contract. I mean that it consisted of forty per cent yearlings—fully forty per cent were yearling steers, which I called Mr. Elias' attention to, and he said, "Very well, we are going to ship them to someone else." I said, "I am not going to trim your herd for you." Mr. Elias was present at that time. I told Mr. Elias that the herd was mostly yearlings. Mr. Meyers asked me, after I called his attention to it, to go in and cut out such cattle as I would take, and we cut out thirty-five or forty head.

I pointed out one steer to Mr. Meyers and objected to it upon the ground that it was a yearling. Mr. Meyers was ready to bet a certain sum of [125] money that it was a two year old. Then in my presence he threw that steer, and we both mouthed him, and Mr. Meyers showed me that it was a two year old. I cut back seven or eight more, and he would not bet as to those, and I said I was ready to take that class of cattle under the circumstances. I was ready to take those cattle, if they were growthy, if they showed two years. On this particular steer I made a bet with Meyers that it would not show a two year old mouth, and might have made a half dozen more and won some of them. There is no man who can tell a two year old steer without looking at its mouth. Any man is liable to make a mistake on one particular steer. I think that thirty-five per cent would be the extreme limit of the cattle under the contract in that herd after the yearlings and runts and lame ones, and fifteen per cent of the *balance trimmed* out. I arrived at that figure by looking over the herd. It is a pretty good guess. I am accustomed to looking at cattle in that way. I was ready and willing to take the cattle under contract up to June 1st. That is the limit of the contract. I expected to ship the cattle immediately at any time that they could put them on board cars for me.

It is a fact that I intended to ship the cattle which I received from the defendant on the cars which I was to supply to them. I still say that up to the 13th of May I was anxious to take those cattle. On the

(Testimony of John G. Hall.)

9th of May, four days before I say I was anxious to take these cattle, I notified the Southern Pacific Railroad Company to cancel my order for cars. That was for cattle that were to be delivered previous to that time—that Mr. Oliver and Mr. Johnson were to receive, and they did not have a train-load. I could not say that that was the cancellation of cars which were to be used by me for the shipment of the bunch of cattle of May 13th under the Alamo Cattle Company contract. I cannot testify to that because I was not there on the 9th. I don't know [126] what was done. Whatever was done at that time was done by Mr. Oliver. We had an order in with the Southern Pacific—a blanket order for something like one hundred cars to be used to protect the shipment of these cattle purchased from the Alamo Cattle Company. I had no other cattle contract at that time in Nogales. And the only cars I ordered were ordered by me to receive the cattle from the Alamo people under my contract.

Q. I ask you to look at a telegram which purports to be signed by W. D. Oliver and addressed to the agent of the Southern Pacific railroad, and dated May 9th. I ask you whether you ever knew of that telegram before it was sent.

A. No, sir; I did not. That was sent from Tucson and I was not here.

Q. Do you recognize the substance of the telegram?

A. Yes, sir.

Q. Do you admit that the telegram was sent by

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(Testimony of John G. Hall.)

Oliver and received by the company? A. Yes, sir.

Mr. SEABURY.—We desire to offer that.

Mr. SEABURY.—We offer in evidence, if your Honor please, what purports to be a night letter from Mr. K. D. Oliver, from Tucson, Arizona, and dated May 9, 1913. I have there, if your Honor please, the file of the Southern Pacific Railroad Company.

The COURT.—It will be admitted, with the privilege of withdrawal by substituting a copy thereof.

Mr. SEABURY.—I desire to read it. I claim that it is a part of the correspondence already offered.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—I would like the stenographer to take this exhibit, Defendant's Exhibit No. 1, as follows: (Reads:) "Night letter. Tucson, Arizona, May 9, 1913. Agent, Southern Pacific Company, Nogales, Arizona. Refer our file No. 2. Car order for thirty-two Santa Fe stock, load your station tomorrow; please cancel, as cattle not ready. Writing you from El Paso. (Signed) K. D. Oliver."
[127]

Q. Now, Mr. Hall, I ask you to look at a letter purporting to be on your stationery, dated from El Paso, May 24, 1913, and signed J. G. Hall by P. B. Dickson, and ask you whether that letter was authorized to be sent by you.

A. (After examining letter.) I could not say whether I authorized that letter to be sent or not, but presume probably I did, because it is dated after we

(Testimony of John G. Hall.)

got notice from the Alamo Cattle Company that they positively refused to deliver us any more cattle. I didn't want to hold the cars there under demurrage. I think that probably the letter was sent by my authorized representative, though I don't recollect the circumstances clearly.

Mr. SEABURY.—We offer it in evidence.

Mr. SEABURY.—I desire to read Defendant's Exhibit No. 2.

(Reads letter marked "Defendant's Exhibit No. 2.")

I don't know that there was any settled time for notice to the Southern Pacific Railway Company to supply cars, provided I always gave them such notice as I could. After making a purchase of such a bunch of cattle as this, I would give them all the notice I could, and depending on circumstances. Sometimes I could get cars on two or three days' notice, but you can't rely on that. No; at some times it would be safe; at others it would not. In my judgment, it was safe to rely on it on May 13, 1913, because there were lots of cars stored there at Nogales at that time. In fact, they were stored there under my own order. After I cancelled the order on May 9th, I claim that, notwithstanding my duty to supply the cars, that I was still ready on May 13th to take the cattle.

Q. I show you a letter dated April 28, 1913, which purports to be on your stationery, and signed K. D. Oliver, and ask you whether or not that was written

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(Testimony of John G. Hall.)

on your paper, with your authority, by your agent,
Mr. Oliver.

A. (After examining paper.) Just repeat the
question, Mr. Seabury, please. [128]

Q. I ask you whether that was the letter your
agent, Mr. Oliver, addressed to the Southern Pacific
Company with reference to these cars. A. Yes.

Mr. STONEMAN.—No objections.

(Mr. Seabury reads Defendant's Exhibit No. 3.)

It is a fact that I placed the original order as early
as February 13, for delivery in April and May. In
the face of that fact I still wish to be understood that
I regarded it as absolutely safe as late as May 13,
1913, to be without cars at all, for the shipment I
was looking at on May 13, 1913, at the ranch of the
Alamo Cattle Company, because there would not have
been over eight or nine cars if I had taken every
animal they had that complied with the contract. It
was only a cancellation of part of the cars. About
sixteen hundred cattle could have been loaded on the
thirty-two cars that I canceled on the 9th of May—
thirty-two cars, would have been handled in one train.

The expression "train-load" means anywhere
from fifteen to thirty-two cars. If a man had thirty-
four or thirty-five all together, it would go out in the
same train. I have seen forty or fifty, but that is
exceptional.

My understanding of the expression "train-load"
used in the contract is not less than fifteen cars. Any
more that they might deliver. The defendant had

(Testimony of John G. Hall.)

the option to fill any number of cars greater than that.

Mr. SEABURY.—Q. I show you a letter dated May 5, 1913—purported to be signed by J. G. Hall, per P. B. Dickson, and ask you to look at it and state whether or not that was sent by your authorized agent to the Southern Pacific Company.

A. It is; yes. As I understand it, this blanket order that was put in under date—I don't remember the date—some time in February.

Q. Pardon, Mr. Hall, just answer the question. Did that go out with your authority—by your authorized agent?

A. By my [129] bookkeeper.

Mr. STONEMAN.—Absolutely no objections.

Mr. SEABURY.—We ask that it be marked for identification. It is Defendant's Exhibit No. 4. (Reads.)

The COURT.—What is the date of that letter?

Mr. SEABURY.—May 5.

Q. Now, Mr. Hall, I wish you would tell us again what it was that was said between you and Mr. Kibbey in regard to the offer to retain four thousand dollars and to pay you six thousand dollars. Tell us first, please, when this conversation took place.

A. It took place the following day—May 14th—after we had been down to the ranch looking at the cattle. In Mr. Kibby's room in the Montezume hotel, in Nogales, Arizona. Mr. Kibby, Mr. Oliver and myself were present.

Why, I don't remember what took place; I can't

(Testimony of John G. Hall.)

say positively whether Mr. Elias was there or not. He had a very sick child. He was with us part of the time. I don't know whether he was there when the conversation took place or not. Mr. Kibby thought that he was entitled to a certain amount of this money, on account of having to gather and hold these cattle, and I told him it was no fault of mine that he did not have the cattle to deliver to me in train-load lots as required by the contract; that I was damaged more than he was. But he seemed to insist that that was the best settlement that he would make—allow him to retain four thousand dollars, and pay me six thousand dollars in deferred payments, to which I objected. And I told him that I considered the damage was coming to me, not to him; that I had the cattle sold. I explained to him how I had these cattle sold out, and I would have to lose my profit on the cattle; and we discussed it back and forward for considerable time, and finally he said that he would not make any settlement unless he could get approximately four thousand dollars out of [130] the deal in some way or other, and we finally—he finally said that he thought he could make four thousand dollars profit on this thousand head of big steers, if I would give him until fall to get them. I told him I would do it if he gave me a contract and a receipt on the contract for ten thousand dollars. I would have taken ten thousand dollars from Mr. Kibby or anyone else at that time and date and would have quit the deal. It isn't a fact that any settlement between me and Mr. Kibby was dependent entirely upon Mr.

(Testimony of John G. Hall.)

Myers being satisfied with the transaction. We had nothing to do with Mr. Myers. I had a contract with Mr. Myers. I was under contract with Mr. Myers to pay him three dollars a head clear profit on two-year old steers.

After this talk I had with Mr. Kibby I didn't have a contract with Mr. Myers in regard to this matter. I didn't see Mr. Myers, at all after May 13, 1913, until some time in June when I saw him in El Paso, but I don't remember definitely what conversation I had with him. Nothing impressed itself upon me as being important.

Q. Did you or not state to Mr. Myers at El Paso, in substance, that you, or Mr. Oliver, had made a mistake?

Mr. STONEMAN.—We object, if your Honor please, on the ground that it is not proper cross-examination upon any subject upon which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose.

The COURT.—Now, is that material, Mr. Seabury, if he did make a mistake? Is that material in this case? He might have come to that conclusion, in view of the facts and circumstances, but would that shed any light on whether or not this contract had been complied with by the defendant or by himself?

Mr. SEABURY.—We thought, if your Honor please, that an admission to indicate that Mr. Hall admitted at that time that he was in [131] fault; the expression that he had made a mistake in not accepting the cattle, we thought, included such an infer-

(Testimony of John G. Hall.)

ence, and if so, it would be an admission against interest, and we have a right to show that Mr. Hall did say that he said so to him at that time.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

I discussed these cattle that I saw in May, 1913, at the ranch of defendant, with Mr. Johnson, the representative of the Clay, Robinson Company. It isn't a fact that I told Mr. Johnson that those cattle were in every respect up to my contract. I didn't ask him to take those cattle. I told him I could not think of asking him to take the cattle under the contract. I don't remember distinctly where we were.

I could not say that I had told all of the conversation that took place between me and Mr. Kibby on the 14th of May in Nogales, with reference to this proposed settlement. I told you the practical and essential part of it.

I did not reject the cattle on the ground that they were not branded. The sole grounds of my objection were that the cattle were not as good as Terrazas cattle, and there was not a train-load of them. In other words, my objection was that there was not a train-load of the cattle as good as, or better than, Terrazas cattle offered to me by the defendant in shipping condition. I think that is all the objection that I made. I am quite certain Mr. Elias told me on May 13th he had never seen the Terrazas cattle. I told him this cattle didn't come up to the Terrazas cattle in quality and grade. He said, Mr. Hall, I don't know as to that; I know nothing and never saw

(Testimony of John G. Hall.)
the Terrazas cattle.

I think fully ten per cent of the cattle of that lot of eleven hundred that I saw on the 13th of May, 1913, were too weak to ship. There was more than forty-five per cent in condition to ship of all the cattle they had together there, but fully forty per cent of [132] them were yearlings. That is my estimate, I think, as accurately as I could estimate.

Thereupon the Court took a recess until two o'clock, the jurors being admonished by the Court as heretofore, and at the conclusion of the recess returned into court, both parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, and thereupon the following further proceedings were had herein, to wit:

JOHN G. HALL continued to testify as follows:

Mr. Johnson refused to accept cattle which I offered him under his contract with me at the time that the first shipment was effected.

Q. He saw the cattle that the defendant offered to supply under its contract with Myers about May 9th, did he not?

A. It is a fact that Mr. Johnson saw some cattle which the defendant was ready to deliver under this contract about May 9th. It is also a fact that after that time and after he had seen those cattle shown him at that time, he refused to accept them under my contract with him.

Q. You have said, as I understand you, that the only ability which you had to perform your contract with Myers and with the defendant here was depend-

(Testimony of John G. Hall.)

ent upon Mr. Johnston's acceptance of your cattle; isn't that so?

A. Well, I am satisfied that Mr. Johnston or rather Clay, Robinson & Co. through Mr. Johnston, would have paid for any cattle I accepted under that contract. I had that arrangement with them.

Q. So the only purchaser you had at that time, May 9th, was in reality Johnston, through Clay, Robinson and Co.?

A. Well, I couldn't sell the cattle twice. I had already sold them to Johnston. I couldn't sell them to anybody else.

Q. So as I have said, you had no other ability to take those cattle, if they were not acceptable to Mr. Johnston, isn't that [133] so?

A. As I said before, Mr. Johnston was ready to take anything that I accepted under the contract. He was ready to pay for anything I accepted under the contract.

Mr. SEABURY.—That's all.

Redirect Examination.

(By Mr. STONEMAN.)

Q. I hand you this paper and ask you to tell me what that is.

A. That is the original contract that I made with Clay, Robinson & Co. for the purchase of these cattle.

Mr. STONEMAN.—We offer it in evidence and ask that it be marked plaintiff's exhibit with the proper designation.

Mr. SEABURY.—No objection.

(Testimony of John G. Hall.)

Received in evidence and marked Plaintiff's Exhibit "O."

Exhibit read to jury.

Q. Mr. Hall, did Clay, Robinson & Co. or their agent, Mr. Johnston, ever indicate to you that this contract that has just been read was cancelled or would be cancelled in the event you were able to deliver cattle purchased, contracted to be purchased from the Alamo Cattle Company?

Mr. SEABURY.—We object to the question as not relevant to the case and not binding upon the defendant.

The COURT.—What is the purpose of that?

Mr. STONEMAN.—If your Honor please, it has been attempted to be brought out on cross-examination. The evident intent of the question is to show that this contract of Clay, Robinson & Co. was cancelled before—according to Mr. Hall's testimony—the Alamo Cattle trade was declared off. For that reason the source of the ability of Mr. Hall to pay for the cattle that might be delivered under the Alamo contract had failed and was no longer available. I simply was asking it on account of the cross-examination.

The COURT.—I overrule the objection. [134]

Mr. SEABURY.—We except.

Q. What is the answer?

A. I hardly know how to answer that question. There was no formal cancellation of the contract. They still wanted the cattle and I gave them all the

(Testimony of John G. Hall.)

assistance I could and furnished them several thousand head of cattle to take the place of these cattle that I should have got from the Alamo Cattle Company.

Mr. SEABURY.—We move to strike the answer out as not responsive and also upon the ground that the answer includes alleged statements between Mr. Hall and Mr. Johnston which are in no way binding upon the defendant in this case.

The COURT.—The statement was made by Mr. Johnston you say?

Mr. SEABURY.—Yes, your Honor. The answer included alleged statements, as I understood it, between this gentleman and Mr. Johnston. His desire to comply with the Clay, Robinson contract which is in no way material or relevant to the issue here.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

Mr. Oliver and Mr. Kibbey were present at the hotel in Nogales at the time of the conversation about which I was cross-examined by Mr. Seabury this morning. I think Mr. Elias was in the room part of the time, only a part of the time. The conversation arose from the statement that Mr. Elias made when I was out at the herd that he couldn't do anything. When he said he couldn't deliver these cattle, I said, "What do you want to do about it?" He said, "I don't know until we go back to town and see Mr. Kibby." When we got back we all went to see Mr. Kibbey, went to his room and discussed the matter. Mr. Elias stayed there for

(Testimony of John G. Hall.)

a short time and was called away, I think, by the sickness of his little child. The ten thousand dollars which had been paid were certainly referred to.

Q. How did the offer of settlement happen to be made?

A. It was [135] made after I made demand for return of my ten thousand dollars after Ramon said he couldn't deliver the cattle.

Mr. STONEMAN.—That's all.

[Testimony of K. D. Oliver, for Plaintiff.]

K. D. OLIVER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is K. D. Oliver. I am acquainted with Mr. Hall, Mr. J. A. Johnston, Mr. H. W. Moore, Mr. Ramon Elias, Mr. Kibbey and Mr. Ed. W. Myers. On January 16th, up to and including the first day of June, 1913, I was manager of Mr. Hall's business and as such represented his interests in the transactions had with the Alamo Cattle Company concerning the delivery of certain cattle under a contract. I have been engaged in the cattle business about 15 years. I have had experience in running and gathering Mexican cattle. I know a grade of cattle in old Mexico known as the Terrazas cattle.

Before February 4, 1913, I ran a ranch adjoining one of the Terrazas ranches in Mexico and I have

(Testimony of K. D. Oliver.)

bought a good many of the Terrazas cattle. The Terrazas cattle are better bred cattle, and different from ordinary ranch cattle in that they have been crossed with American bulls, bred up. It shows in the frame, and bone and color, size, general quality. There is a difference between Terrazas cattle and ordinary range cattle in Mexico as to their shipping qualities. About 50 or 48 head of two-year old cattle of the grade, kind and character of the Terrazas cattle can be loaded in a 40-foot cattle car. It depends on the age and on the condition of the flesh too.

On or about the 6th of April, 1913, I made a trip into Mexico for the purpose of inspecting these cattle as the representative and authorized agent of the plaintiff Hall. It was the second [136] trip that I made to Mexico to inspect these Alamo cattle. I made the first trip in January, 1913, that was before Hall bought the Myers and Tankersley contract. The first trip in Mr. Hall's behalf was the trip I made about the 6th of April, 1913. I went down there that time to show the cattle to Mr. Johnston and Mr. Moore. Mr. Johnston was manager of Clay, Robinson and Company office in Denver and Mr. Moore was a cattleman from Colorado. I do not think that prior to that time I had any conversation with either Mr. Kibbey or Mr. Elias with reference to these cattle. On the trip I made down about the 6th of April for the purpose of inspection, both Mr. Elias and Mr. Kibbey were present. Neither Mr. Kibbey or Mr. Elias told me on that trip that the herd in which I was riding was a herd gathered for deliv-

(Testimony of K. D. Oliver.)

ery under the contract at issue in this suit. It wasn't a herd gathered for delivery. There was no herd. There was no herd, just a few rounded up and held for inspection. Mr. Elias and Mr. Kibbey pointed them out as samples of the cattle to be delivered under the contract. The cattle they pointed out at that time were contract cattle and were fully up to the grade and complied with the descriptions called for in the contract, Plaintiff's Exhibit "A," with which I am familiar. I don't know exactly as to the number, but there weren't many.

I next went into Mexico upon the business of Mr. Hall connected with this contract in the early part of May, the first week or ten days of May, to receive the herd of cattle of the Alamo Cattle Company under this contract. The Alamo Cattle Company had sent a telegram or letter stating that the cattle were ready for delivery. Mr. Johnston of Denver and Mr. Howe of El Paso went with me. Mr. Johnston represented Clay, Robinson and Company in Denver, with whom Mr. Hall then had an existing contract as to the disposition of these cattle which were to come to Hall under the contract. We went about May 9th, 1913, to a [137] ranch known as the Distilladero, one of the pastures of the Alamo Cattle Company. They said they had about a thousand head of cattle gathered there. I thought it ran a trifle short of that. I rode through that herd for the purpose of inspecting them. From my inspection I consider that a very small portion of the herd would have been cattle of the sizes, ages, quality and brands called for

(Testimony of K. D. Oliver.)

in the contract referred to as Plaintiff's Exhibit "A." I should say not more than 50 per cent if—not more than 50 per cent if that many. The rest of them were either short, aged, deformed or runts, or tender-footed, or thin, ill-shapen, or something of that—or not of the grade, not of sufficient quality to be of the same grade. Of the cattle that I inspected at that time I shouldn't say came up over four or five hundred head to the requirements of contract cattle. About eight or ten carloads. Out of which under the terms of the contract there was still to be a cut of 15%. On that occasion I had a conversation with reference to these unmerchantable cattle with both Mr. Kibbey and Mr. Elias. I told Mr. Elias that the cattle were not contract cattle; that we didn't want to take them; there weren't sufficient numbers and that the herd of cattle wasn't properly tendered. It wasn't in shape for the buyer to cut—to pass on them. They hadn't cleaned up the herds themselves. At first Mr. Elias said he didn't agree with me. Then upon our arguing the matter he said he agreed that they were not contract cattle; that there were many cattle in there that were not contract cattle. Mr. Kibbey said substantially the same as Mr. Elias at that conversation. Before that conversation they had requested that I accept this herd as contract cattle. At that time and immediate place I did not see any four year olds.

Q. At any time did Mr. Kibbey or Mr. Elias for the Alamo Cattle Company offer or tender any four year olds under a claim [138] by them that they

(Testimony of K. D. Oliver.)

were contract four-year olds?

A. No, sir; at no time.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, upon the ground that there has been no proof up to the present time that the plaintiff demanded a delivery of four year old cattle under this contract and until such proof is offered, it is improper to try to show the failure on the part of the defendant to deliver such cattle. We are not under any such obligation until demand has been made.

Mr. STONEMAN.—If your Honor please, I don't quite catch the force of my friend's objection, in that there is no provision in the contract that demand shall be made by the buyer of either four year olds or two year olds and that the demand is made on the examination for delivery.

Mr. SEABURY.—The last clause of the contract, Plaintiff's Exhibit "A," "cattle to be cattle, etc."

Mr. STONEMAN.—The only cut that is mentioned in the contract, if your Honor please, is the cut of 15% after tender has been made of cattle in train-load lots, exclusive of unmerchantable cattle and cattle not up to contract.

Mr. SEABURY.—The cutting, if your Honor please, is the privilege of the buyer. It had nothing to do with the seller's obligation and the seller's obligation to deliver did not accrue until he had received fifteen days' notice of delivery in train-load lots. We submit the contract means that if the ground of rejection on the part of plaintiff was going

to be that cattle were not *four olds*, instead of two, he must first show he asked for four year olds. There isn't any such proof at all. There is no proof that they objected at any time upon the ground that they were not four year olds. We think until they show that they made request on the defendant that there be such quantity of four year olds there could be no breach of the [139] contract in that respect.

The COURT.—In view of the testimony in this case, I think that is a proper question and I overrule the objection.

Mr. SEABURY.—We except.

At the Distillidero ranch at the time of this conversation Mr. Kibbey and Mr. Elias agreed to make another gathering of two year old steers and tender us on about the 25th of May from 2,000 to 2,500 head more cattle. We then went back to Nogales together in two or three machines. After we got back to Nogales we simply talked over the situation again and agreed that we would come back on the—on the 25th to receive—to pass on the 2,000 or 2,500 head of cattle that Mr. Elias and Mr. Kibbey agreed to have gathered at Distillidero. Discussed that matter more fully. That was on May 9th.

I think there were a sufficient number of cars at Nogales to receive a train-load of cattle, if they had been delivered in train-load lots on the 9th or thereabouts. They were ordered. I am quite sure they were there. I remember we were checking it up with the agent, of speaking to him when I got off the train.

Q. Do you know whether or not there was any can-

(Testimony of K. D. Oliver.)

cellation of the order of any of these cars?

A. I cancelled them myself.

Q. When? A. I don't remember the exact date.

Q. Before or after this trip to Mexico about which you testified?

A. That I am not sure. I cancelled them because— if I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards, it was after I saw the cattle.

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that is not a proper response to the inquiry and we move to strike it out.

The COURT.—I overrule that objection.

Mr. SEABURY.—Exception. [140]

I sent a telegram from Tucson to the agent of the Southern Pacific at Nogales in words indicated by Defendant's Exhibit 1. Since reading that telegram I am now able to say why I cancelled the car order. It was because the cattle weren't ready. And that was after my return from Mexico when I looked at these cattle. After I sent this telegram from Tucson I went to El Paso, after I sent this telegram. I think two days later I returned from El Paso in company with Mr. Hall at his request for further inspection of cattle claimed to have gathered by defendant under the contract. That was about the 12th of May. I again inspected some cattle under herd by the Alamo Cattle Company. I think they were practically the same. In exactly the same spot, I think. There

(Testimony of K. D. Oliver.)

may possibly have been a few more, hundred or two more head. Possibly the same proportion as the first herd were contract cattle. The cattle of this second herd that were not contract cattle were short aged, runts, thin cattle, tender-footed cattle, sway-backs, stags.

Q. Are tender-footed cattle merchantable cattle?

A. They are not shipable cattle.

Q. Why?

A. You cannot ship them. They lie down and are tramped on.

On this second occasion Mr. Elias said that the cattle were contract cattle and I said that they were not and pointed out certain cattle that were contract cattle, and he said, then, that if we wanted all cattle like that, he could not fill the contract. Mr. Hall and Mr. Ed. Myers were also present. I don't think Mr. Kibbey was there. Mr. Hall cut out some of the cattle in that bunch. I was on a horse with him in the herd, and looked the cattle over with him. The purpose of cutting out those cattle was to see what kind of cattle we wanted—to take them if there was a sufficient number to take. There were not there cattle of the kind and quality which I cut out sufficient [141] in number to make up a train-load lot. I said something about the conversation had with these gentlemen to the effect that they would gather twenty or twenty-five hundred head for delivery late in May, 1913. I was acting as the agent of Mr. Hall during the month of May, 1913.

Q. Did Mr. Kibbey or Mr. Elias, or either of them,

(Testimony of K. D. Oliver.)

attempt to make the delivery of twenty or twenty-five hundred head during the month of May?

A. No, sir.

Mr. SEABURY.—We object to that, if your Honor please, upon the ground that there is no proof of any demand for that delivery at that time, and move to strike the answer.

The COURT.—Objection overruled.

Mr. SEABURY.—Except. Your Honor, may it appear of record that the ground of the objection was that it does not appear that the defendants were given fifteen days' notice before this alleged failure on their part.

Mr. STONEMAN.—For the purpose of aiding your Honor in the ruling, I submit that there is a telegram in evidence here to ship any number of cattle they wanted to, dated on the 14th day of May.

The COURT.—I remember that.

Mr. STONEMAN.—The telegram I have referred to, may it please the Court, is this telegram: "I am ready and willing and hereby demand all cattle coming within the contract of January 16th with Meyers, which contract was transferred to me, delivery to be made between May 29th and June 1st, 1913, in train-load lots. Advise when you want cattle cut." Dated, March 14th, 1913, at El Paso, and signed J. K. Hall.

The Alamo Cattle Company did not tender to me or J. K. Hall any cattle between the 14th day of May, 1913, and the first day of June of that year.

(Testimony of K. D. Oliver.)

Mr. STONEMAN.—You may cross-examine.
[142]

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Oliver, I show you a letter dated February 4th, 1913, and ask you if your signature is attached to it. A. Yes, sir; that is my signature.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) “J. K. Hall, Livestock Commission, El Paso, Texas—Alamo Cattle Company, Magdalena, Sonora, Mexico. I beg to advise that I have this day sold and transferred all my right, title and interest to the contract I hold with your company, dated January 16th, 1913, for four to five thousand two year old steers and one thousand four year old steers to J. K. Hall, of El Paso, Texas. Mr. Hall shows his approval of this letter by signing with me, and also his willingness and intention to carry out the terms of the contract in every way.” Signed, E. W. Meyers, J. K. Hall, by K. D. Oliver, Manager.

(By Mr. SEABURY.)

Q. I show you another letter dated April 21st, and purporting to be signed K. D. Oliver, Manager, and addressed to the Alamo Cattle Company, and ask if you signed the letter.

A. Yes, sir, that is my signature.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) “J. K. Hall, Livestock Commission, El Paso, Texas, April 21st, 1913.—Alamo Cattle Company, care First National Bank,

(Testimony of K. D. Oliver.)

Nogales, Arizona. Gentlemen: With reference to the cattle we have purchased from you, we beg to advise that we would like to receive the first train of two year old steers to load at Nogales, about the 10th of May. We wish you would advise by return mail or by wire if you are delayed in getting this letter, the exact date it will be necessary for the writer to be in Nogales to go with you to cut the cattle. We want to receive these two year old steers in train-load lots of 1,000 or 1,500 head as [143] the person who has purchased in Montana has several days to drive from his place to the train and does not wish to drive without this bunch. Awaiting your reply, which will enable us to place an order for the exact number of cars we will require (the original blanket order having been placed), we beg to remain, Yours truly, K. D. Oliver, Manager."

(By Mr. SEABURY.)

I cancelled the order for the train to take these cattle from the Alamo people on May 9th after I had inspected a lot of cattle on that day. I came back to the Alamo ranch and examined more cattle under this contract with Mr. Hall on the 13th. I knew at the time I examined those cattle on May 13th—that my order had been canceled on the 9th. On May 13th I had a blanket order outstanding to receive cars.

Q. Don't you know that a blanket order is not sufficient for the company to have cars for your disposal without a special order?

A. They had cars in Nogales.

Q. How do you know they had cars in Nogales?

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(Testimony of K. D. Oliver.)

A. I don't.

Q. How do you know they had enough to take a thousand head of cattle?

A. The agent at Nogales told me. That is my only source of information.

Q. The fact remains that you had not placed any order?

A. I had placed a blanket order to take care of the whole shipment. The length of time before you want cars of this kind it is necessary to give the order depends on the time of the year. May, 1913, was the middle of the cattle season in Nogales. It was apparently the rush season. I knew cattle were being shipped at that time. The cars ordered by ourselves were not in use at that time. I mean to say the Southern Pacific Railroad Co. was saving cars at Nogales for our use under a blanket order of February 17th, 1913. Notwithstanding the fact that I had canceled the order for thirty-two cars on the 9th of May. [144]

I went to Mexico to examine cattle in January, 1913, also in April, 1913, and also on the 9th and 13th of May, 1913.

I did not say that our blanket order was sufficient to entitle us to the immediate use of cars at Nogales. I said the blanket order would protect the cars being there. I mean that that would provide that cars would be on hand, provided we ordered them in time. Provided a definite order was given. A definite order was given for the 9th. On the 13th no definite

(Testimony of K. D. Oliver.)

order was given. But the blanket order still existed. I considered that the existence of the blanket order justified me in not ordering cars for the 13th. I sent in the telegram on May 9th to save demurrage.

Q. I ask why did you order thirty-two cars to be ready for you on May 9th if you were satisfied under a blanket order they would have sufficient cars there.

A. If they had the cars on May 9th the chances were they would have the cars in that vicinity. That was the reason. On the 9th of May I told Mr. Kibbey and Mr. Elias that cattle which they showed me at that time for delivery to our people on the contract were not as good as or better than Terrazas cattle. On the 9th I asked them to supply us with a train-load of cattle and they failed to do it. I should think it would be considered as a breach of the contract. I don't remember how I regarded it. I wanted the cattle.

After I left Nogales on May 9th I went back to El Paso. I got there the following morning, I presume. I went straight back, stopping only here in Tucson long enough for a train.

I said I had a conversation with Mr. Kibby and Mr. Elias on the 9th, in which he said he would have another bunch of cattle to offer me about the 24th or 25th of May. There was no talk between me and Mr. Kibbey and Mr. Elias in regard to any compromise of this situation. At that time there were no talks at all. I did not see Mr. Myers. Mr. Johnston was present at some of the talks [145] I said I had with Mr. Kibbey and Mr. Elias.

(Testimony of K. D. Oliver.)

These cattle had already been sold to Mr. Johnston. The reason I brought Mr. Johnston down was not to find out whether these cattle would be accepted by Mr. Johnston. He came down to be present when the cattle were delivered. When one buys anything he likes to be on hand. I did not bring Mr. Johnston down for the purpose of finding out whether he would accept them. Mr. Johnston was with me, however. He looked the cattle over with me. I and not Mr. Johnston refused to accept. They were never tendered to Mr. Johnston. The cattle were not tendered to Mr. Johnston because they were not received by me. They could not have been offered him. It is not a fact that in the presence of Mr. Elias and Mr. Kibbey on May 7th I told Mr. Johnston that those cattle were up to the contract. The sale to Mr. Johnston of these cattle had been made. I came to receive these cattle. Mr. Johnston could not refuse to receive the cattle had they been contract cattle. I did not make any tender to Mr. Johnston on May 9th of the cattle which were offered by the Alamo Cattle Company. I did not. How could I? The responsibility for the receipt or rejection of those cattle rests entirely with me. On the 9th of May the only thing left open between me and Mr. Kibbey and Mr. Elias was that they were to deliver twenty-five hundred head of cattle on the 25th. They agreed to that. I don't think there was any reason for me to communicate with them between the 9th of May and the 25th of May on that subject. Oh, I forgot. There was a man in Tucson waiting to hear about these

(Testimony of K. D. Oliver.)

cattle—one of Mr. Johnston's customers—and if he wanted to take cattle in less than a train-load lot, I was to come back the next day and examine these cattle again. However, I did reject these cattle on May 9th as contract cattle.

Q. You still want to be understood that these were not contract cattle?

A. There was not a train-load lot. [146]

Q. You want us to understand, then, that you told Mr. Kibbey and Mr. Elias on the 9th of May that the cattle these gentlemen offered you were not contract cattle because they were not in train-load lots?

A. That is one of the reasons.

Q. What was another?

A. They did not have enough.

Q. Was there any other reason?

A. I did not want to handle in less than train-load lots. After cutting out the sways, runts and cripples, we did not want to handle them if less than train-load lots. I told Mr. Kibbey and Mr. Elias that these cattle were not as good as Terrazas cattle. I declined to accept them on that account. At that time I tried to say they were not in train-load lots. There were not enough cattle. They were sorry and too thin to ship. That all brings us down to the fact that they did not have a train-load. I objected to the cattle because they were not contract cattle. I pointed out the various defects. The defects were, short ages, runts, sway-backs. As a matter of fact, there was no possible ground for exception that I did not take. It was my business to protect Mr. Hall's

(Testimony of K. D. Oliver.)

interests. I was going to do it. I was playing safe all the way down the line. I was not raising the question all down the line as to whether the contract existed or not. I did not say in substance to these gentlemen that while these cattle are not good under the contract, and I am not required to take them, yet after I get back to Tucson I may take them. But if Mr. Tainter took them, I would. He was a man who was going to get the cattle. My rejection of the cattle on May 9th did not depend on Tainter's rejection of the cattle. Under the contract I turned the cattle down first. Then I said if Tainter takes the cattle, I will take them. I made that statement in Mr. Hall's behalf.

Mr. Kibbey and Mr. Elias were to hear from me as to whether or not I was to take the cattle. I sent a telegram from Tucson [147] the night of the 9th. I know I wired at that time that I would not be back; that I was going to El Paso. I did not wire whether or not Mr. Tainter was going to take the cattle. It was understood that if I did not come back the next morning I was not to take them.

Q. Now, I show you a telegram dated May 9th, and purporting to have been signed by you.

A. Yes, that is right.

Q. Addressed to W. B. Kibbey at Nogales, and ask if you sent it. A. I sent it.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) "Tucson, Arizona, May 9th, 1913: W. B. Kibbey, Jr., Nogales, Arizona—Going El Paso in the morning and will write you

(Testimony of K. D. Oliver.)

fully from there. E. D. Oliver.”

Q. So that, on the 9th of May, when you sent your telegram you did not advise them anything at all with reference to Tainter’s attitude in regard to these cattle?

A. It was understood that if I did not come back on the 10th they would not hold the cattle for us for that delivery. This telegram was the advice. I did not intend to write fully from El Paso and tell him about the acceptance of the cattle. There was nothing to write about Tainter. I was to write about the further delivery of the cattle. That is the best explanation I can give of the telegram. That telegram explains that I went to El Paso. That is the only significance I attach to the telegram. That I went to El Paso and not Nogales.

Q. And that, according to the statement given of your arrangements with Mr. Kibbey and Mr. Elias was that Tainter had declined to accept the cattle?

A. That Tainter had declined to come down and look at them.

Q. You did not say anything about Tainter coming down to look at the cattle?

A. I think I did. I intended to. I don’t recall seeing Mr. Myers at all on May 9th. I saw him on May 13th. He [148] was on the ground then. There was a general talk between me, as the representative of Mr. Hall, and Mr. Elias and Mr. Kibbey and Mr. Myers, with reference to a compromise or adjustment of the situation. I don’t know that there was any special talk in which I participated. I

don't know that Mr. Myers was present. I cannot remember whether or not he was present. He was present in the herd in Mexico, and after we came back and went to Mr. Kibbey's room in the hotel, I don't remember whether or not Mr. Myers was present.

I think Mr. Myers was present in the herd of cattle in Mexico on the 13th and that he stated to Mr. Hall that the cattle were up to the contract.

I cannot recall whether or not I heard him say to Mr. Hall at that time that the cattle were up to the contract between him and Hall. I don't remember having any talk with Mr. Kibbey or Mr. Elias either on the 9th or 13th of May in which I told them that it would not matter whether Mr. Johnston took the cattle or not, that, if he did not, Mr. Hall has another purchaser in New York coming for them. I do not recall anything similar to that.

Q. Do you know whether there was any other deal pending between Mr. Hall and anyone else to take these cattle if Mr. Johnston refused them?

A. I cannot say definitely but it seems to me that there was another place to put the cattle. That is my best recollection. Tainter was to take the cattle to Montana. He is the man referred to in these letters as the man from Montana. I made the arrangements for Mr. Hall about the cars. I was in charge of the closing of this cattle contract.

On the 9th of May when I examined these cattle I expected immediate delivery of the cattle on that day. If the cattle had been satisfactory to me I

(Testimony of K. D. Oliver.)

would have received them immediately, as soon as practicable, that would have been, either that or the [149] next day. I don't know the exact distance of travel. The ranch was at Distillidero. I should say it is nine or ten miles for the cattle and perhaps one-third longer in the machine.

If I had found the cattle on May 9th to be satisfactory they would have immediately moved north.

It is my impression now that I had the cars waiting for them on the 9th at Nogales. That was before the cancellation of the order for the thirty-two cars.

Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle.

Mr. STONEMAN.—We object for the reason that there is no evidence upon which that question can be based, in that it does not appear that the cattle were contract cattle already for delivery free on board cars at Nogales, and, under the contract, we don't have to make arrangements except under those conditions.

The COURT.—I would like to hear counsel for the defendant on that.

Mr. SEABURY.—I don't think I care to be heard on it, your Honor.

The COURT.—I sustain the objection.

Mr. SEABURY.—I except.

I got to the ranch in Mexico on the 9th of May, about noon. I still say that if these cattle had been

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(Testimony of K. D. Oliver.)

all right I would have immediately moved them north. I don't know whether they would have traveled as far as Nogales by night. The length of time it takes to drive nine miles depends on the country. We did not go over the country the cattle would have gone over. We went around the road, and the cattle would have gone through the hills. I am not sufficiently acquainted with the hills—

I suppose the Bank at Nogales closes at the usual banking [150] hour of three o'clock. I was not in the bank in Nogales prior to my going to the ranch in Mexico on the 9th of May, 1913, for the purpose of making arrangements for the guaranteeing of this payment. I never saw any of their officers and never made any arrangements of any kind or character for that purpose.

(Recess of ten minutes from 3:50 to 4 P. M.)

Mr. STONEMAN.—If your Honor please, through the courtesy of Mr. Seabury and Mr. Barry, we have arranged that this witness may be examined on other points than will probably be included in the cross-examination, in order to enable him to go back to Phoenix to-night. I am making this arrangement so that the record will not show that the objections have not been properly interposed.

Mr. SEABURY.—I have just informed Mr. Stoneman that I was about to ask a question that would not be proper cross-examination and he kindly told me to go ahead.

I was thoroughly familiar with the cattle known as the Terrazas cattle. Those cattle come from the

(Testimony of K. D. Oliver.)

State of Chihuahua in the Republic of Mexico. The American market for those cattle is any pasture country in the north. But the point of delivery is chiefly in El Paso, Texas. It is the point of entry; not the nearest market. The cattle are sold to go north, or to some pasture country. They are not necessarily sold in El Paso. They are delivered through El Paso. But practically all of them go through El Paso. I would not say there is an established market at El Paso for them any more than for any other cattle. Terrazas cattle are not entirely all sold in El Paso. They are often all sold there. The market price of Terrazas two year old steers in El Paso in or about the months of April and May, 1913, was I think more than \$23 a head but I am not positive about it. On April 6th when I went down there to examine these cattle at the ranch of the defendant in Mexico, neither Mr. Kibbey nor [151] Mr. Elias offered any of those cattle to me. They told me I could take them then if I wanted them. That is not offering cattle. My recollection is that they told me I could have a train-load of two year olds if I wanted them. I didn't want them at that time. I presume that I gave the reason. The only reason could have been that there was no place for two year olds to go at that time. There is no feed in the north, as a rule, in April. It is too dangerous on account of the storms. I think I said something like that to them in explanation of why I didn't want them. I don't remember whether or not I said anything about extending the

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(Testimony of K. D. Oliver.)

contract for thirty days.

Q. Did you ask them to put off the shipment until later? A. What shipment?

Q. The cattle under this contract.

A. It was not called for until May.

I asked them not to make any delivery of two year old cattle. I think I told them on April 6, 1913, that I wanted four year olds. I think I discussed it with both Ramon and Mr. Kibbey at Magdalena. I was ready on April 6 to take four year olds. Possibly not that day, but I would have taken them shortly after that. I notified them prior to April 6 that I wanted four year olds at that time.

Redirect Examination.

(By Mr. STONEMAN.)

I attempted to get more cattle delivered to me under the contract after May 9th. No special. I was present in Mr. Kibbey's room at the Montezuma Hotel at Nogales on the evening of May 12, 1913, with Mr. Hall, Mr. Kibbey and I think Mr. Elias, but I am not positive about it. I don't recall anybody else being present. I think that as near as I can recall it, Mr. Kibbey stated to Mr. Hall and myself that he considered that we had forfeited the contract, and declared forfeited the ten thousand dollars advance money. Both Mr. Hall and I [152] protested against it, and Mr. Kibbey agreed to give us back five thousand dollars and keep five thousand, and I think then he further agreed to give us back six thousand dollars and keep four, but it seems to me

(Testimony of K. D. Oliver.)

that the six thousand was not to be paid in cash, but paid later on.

On cross-examination I stated that I said that if Mr. Tainter was willing to take the cattle, notwithstanding the fact that the cattle were claimed by me not to be up to contract and were not delivered or tendered in train-load lots, that I would take those cattle. I think I said that; yes, sir. If Tainter was willing, why we would be willing too. But I also said that the herd was not a herd of contract cattle in train-load lots. Mr. Tainter was the man from Montana. I think Clay, Robinson and Company bought the cattle for his account, and we had contracted to resell these cattle to Clay-Robinson. I was endeavoring to comply with the terms of our contract.

Mr. SEABURY.—May I have the privilege of cross-examination again, Mr. Stoneman, in this matter—with your Honor's permission?

Recross-examination.

(By Mr. SEABURY.)

I recall getting a telegram from the Alamo Cattle Company dated May 13, a copy of which you show me, but I didn't get it at Tucson. It was forwarded to me at El Paso. I don't remember when I got it. I presume right after it was forwarded.

Mr. STONEMAN.—There is no objection (after the telegram is handed to him for examination before being marked for identification and introduced in evidence).

(Testimony of K. D. Oliver.)

(The telegram is marked Defendant's Exhibit No. 8.)

I recall a talk between Mr. Elias and Mr. Kibbey and myself about Mr. Myer's position in this alleged compromise. No, I don't remember exactly what was said. In substance it was possibly said that Mr. Kibbey and Mr. Elias stated that whatever arrangement was [153] made would have to be satisfactory to Mr. Myers.

Mr. SEABURY.—With your Honor's permission, I will read Defendant's Exhibit No. 8.

Mr. STONEMAN.—I should like to withdraw my consent to the admission of that copy—to the introduction of this telegram at this time, for the reason that it is incompetent, irrelevant and immaterial for any purpose under the pleadings, appearing to be a telegram referring to a contract sent to Mr. Myers.

The COURT.—How is this material?

Mr. SEABURY.—We think it shows, in a general way, if your Honor please, what we expect to claim, that this alleged talk of compromise was in reality depending, by consent of the parties, upon the approval or acceptance of Mr. Myers. The jury might find very well that the whole thing was dependent upon these various parties agreeing among themselves—in other words, getting away from the real issue in this case as to whether or not the cattle tendered at that time were as good as or better than Terrazas cattle. We think, in view of the fullest kind of examination, both direct, cross, and redirect, on the subject of this compromise, practically all of

(Testimony of K. D. Oliver.)

which would be objectionable, we are perfectly willing to have all this talk come out. Now, that it is in and this witness about to leave the stand and be excused, it seems to us that the plaintiff is in no position to claim the slightest prejudice on account of this evidence, and it is in line with other evidence that has gone in.

Mr. STONEMAN.—I do not base my objection that it is not proper cross-examination, but that it is improper under the pleadings. There seems to be some desire to get away from the real issue of the case, and that is what we don't want to do—that is, whether or not the cattle were as good or better than Terrazas cattle. We renew our objection to the offer.

Mr. SEABURY.—* * * We don't rely on any compromise. We offer the [154] evidence for the purpose of showing that as late as May 13, 1913, these people were still up in the air on this proposition, and were adopting this, as we claim, as a matter of policy. We have elicited from this witness that his acceptance or rejection of these cattle depended entirely on the say-so of a third person. It is to show that in reality there was no real repudiation at all. Another thing, the last part of that, I call your Honor's attention to. In other words, we think that it is clearly susceptible of the inference that as late as May, 1913, matters had not been definitely disposed of as far as these persons were concerned; that there had not been any positive rejection of the cattle as late as that day by the plaintiff

(Testimony of K. D. Oliver.)

and his representative. The last part of that I think indicates that.

The COURT.—I sustain the objection. I will think the matter over. It is not necessary to have the witness here?

Mr. SEABURY.—I think not, your Honor. I did wish to ask him a few questions upon the latter part of this telegram.

The COURT.—It seems to me to be wholly immaterial what that discussion of the settlement was. Nothing is arrived at, and the terms of the contract according to the evidence will not be changed.

Mr. SEABURY.—I don't offer it, as I say, as attempting to prove that there was any other contract in the case, but the fact that the negotiations concerning the adjustment of the matter would tend to show what the real objection was. As I have said, we claim that the evidence already in the case and which we desire to offer in future, tends to strengthen our position that the cattle were not objected to under the contract between Myers and the defendant, assigned to Hall, but simply that he had sold the cattle at an advance, and declined to accept the cattle as he could never pay that price.

Mr. STONEMAN.—May I suggest, if your Honor please, that simply [155] because two sides to the contract are trying to arrive at some means to enable both sides to be satisfied under the terms of a contract and have been unsuccessful in it, it does not necessarily follow the contract is waived and another agreement substituted for the terms of the

(Testimony of K. D. Oliver.)

written contract itself. I make that statement to the Court as a suggestion and in support of the fact that it is hardly the right thing for Mr. Seabury to suggest that that is a waiver. We are not arguing the case before the jury, at the present time, and I should not like the jury to think that because I remained silent I assented to the view expressed by my friend, Mr. Seabury.

The COURT.—I sustain the objection for the present.

Mr. SEABURY.—With permission to renew it later, if your Honor please?

The COURT.—Yes.

Mr. SEABURY.—Then for the purpose of the record, may I present my exceptions now, your Honor?

The COURT.—Yes, sir.

[Testimony of James A. Johnston, for Plaintiff.]

Mr. JAMES A. JOHNSTON, being called as a witness on behalf of the plaintiff, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is James A. Johnston. I reside at Denver, Colorado. I am manager of the Denver house of Clay, Robinson Company, who are in the livestock commission business. My duties as manager are to buy and sell stock on commission. I have been engaged in that business about fifteen years in connection with this house. In pursuit of that business I have had occasion to familiarize myself with cattle

(Testimony of James A. Johnston.)

so as to be able to testify as to grades and qualities. My business is to loan money on cattle.

I have met Mr. Kibbey and Mr. Ramon Elias, representing the [156] Alamo Cattle Company. I know Mr. Hall.

On the 6th day of April, 1913, I went down into old Mexico to look at some cattle. I with one of my customers, Mr. H. W. Moore, with Mr. Oliver, Mr. Elias and Mr. Kibbey went down to look at the class of cattle that Mr. Hall had offered me for two of my customers. I subsequently entered into a contract with Mr. Hall covering those cattle. That contract was made after I went to Mexico. Before that trip I had handled a good many of the Terrazas cattle at various times. I was familiar with the grade of that strain. I saw a number of cattle while in the vicinity of the Distilladero ranch in Mexico, on the 6th of April; saw a good many cattle coming into the ranch to drink, and the second day drove out and inspected the bunch of cattle that had been rounded up by the cowboys. I saw various other cattle on the range as we were driving about. We were driving a good portion of the day.

The cattle which were exhibited to me by Mr. Kibbey or Mr. Elias, or either of them, were a good class of cattle, and I think they would grade better than the average Terrazas cattle. The second day we saw a bunch of several hundred head under herd, the cowboys had rounded them up.

There was a bunch of cattle tendered for delivery in the month of May by the Alamo Cattle Company

(Testimony of James A. Johnston.)

to, I presume Mr. Hall and Mr. Oliver, the cattle which I had been notified to receive under my contract with Mr. Hall. I was told there were twelve hundred head of cattle or thereabouts in that bunch. I didn't count them. From what I know of herds of cattle, I think the number he gave me was approximately correct. I inspected that bunch. From my inspection, I am able to say that the cattle in that herd were not as good or better than Terrazas cattle.

Q. What proportion of the cattle in that herd were below the grade of Terrazas cattle?

A. There was only about twenty or twenty-five per cent of the cattle that were tendered that were [157] up to the sample that I looked at in the first trip. Some of those were not in shipping condition.

Q. Irrespective of the samples—

Mr. SEABURY.—I move to strike out the last answer of the witness on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913.

The COURT.—I understood him to say that they went and looked at cattle that were to be delivered. Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Irrespective of the cattle which were shown you as samples, which I believe you stated were in some respects above the grade—the general grade of the Terrazas cattle—what pro-

(Testimony of James A. Johnston.)

portion of the herd at that time *would*, under the general average grade of the Terrazas cattle, were not as good or better than Terrazas cattle?

A. I should say there was not over twenty per cent of them as good or better.

Q. Did you see any unmerchantable cattle in the bunch, Mr. Johnston? A. Yes, sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes, there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes, quite a number.

Mr. SEABURY.—We interpose objection to this line of examination, that even if the herd contained a substantial number of disqualified cattle, the plaintiff had the opportunity and privilege under his contract to cut out all of those, and in addition, to cut fifteen per cent after that. So, unless this witness is prepared to testify that the herd did not contain a train-load lot— [158]

Mr. STONEMAN.—I can direct your Honor's attention that there is nothing in this contract that required us to clean the herd. The only thing—and that is optional—is that we might cut fifteen per cent out of this herd. If you will show me anything in that contract, if your Honor please, requiring us to clean that herd, I am almost willing to quit this lawsuit.

The COURT.—Objection overruled.

(Testimony of James A. Johnston.)

Mr. SEABURY.—We except.

(Mr. STONEMAN.)

Some of that cattle were very small. Some of them were less than two years old. Mr. Elias informed me that he could not get certain brands of cattle that he expected to get hold of and put in on this contract.

Q. What reason did he give?

A. He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them, and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cattle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle, the new government would take it away from him, and consequently he couldn't get those cattle.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case.

The COURT.—Objection overruled.

Mr. SEABURY.—Exception.

The COURT.—We will adjourn until ten o'clock to-morrow morning. The jurors were then admonished as heretofore.

Wednesday, May 27, 1914.

On 10:00 A. M. this day, both parties being present, the [159] plaintiff in person and by his counsel, and the defendant by its counsel, the jurors returned

(Testimony of James A. Johnston.)

into court and thereupon the following further proceedings were had herein, to wit:

Q. Mr. Johnston, how long have you been engaged in the cattle business?

A. In 1868 I trailed cattle from Texas to Colorado. I have been engaged in the cattle business ever since 1868, directly and indirectly. I have not been engaged personally in it at all times, but I have been connected with people that were. During all of this time I have had occasion to inspect and examine cattle from time to time for the purpose of determining quality and grades.

Cross-examination.

(By Mr. BARRY.)

I inspected a herd of cattle tendered for delivery by the Alamo Cattle Company to J. G. Hall at their ranch in Mexico about May 9, 1913. There were about 1200, I should think. I arrive at that figure in the first place from the information that was given me, and secondly from my experience in handling cattle—I would estimate—they weren't counted by me, but I would estimate there were about that many cattle tendered. I received the information with reference to the number of cattle that were in that herd, from Mr. Kibbey. I didn't count the cattle. In that herd probably about 20 per cent were as good or better than Terrazas cattle. I base that figure on my judgment and experience in handling cattle. From a look at a herd of 1200 head of cattle I could form an estimate that there were 20 per cent of a certain grade of cattle in that herd without counting

(Testimony of James A. Johnston.)

them, approximately so. I don't know how many sway-backs were in that herd. I didn't count them. There were a good many, that I know. How many I can't tell you. There were a good many times ten. I can't say how many times; I didn't count the cattle. I can't say, therefore, how many sway-backs there [160] were in that herd. I didn't notice any lump-jaws; there may have been, or may not; I couldn't say. I wouldn't say whether there were any lump-jaws or not. There were a great many sore-footed cattle. I consider a sore-footed animal a cripple. I didn't count how many there were. There were a great many of them, how many I can't say. There were a great many sore-footed cattle. I didn't count the runts. There were a great many cattle under size. There were a number of stags in that herd. I can't give you the number. I didn't count them. I don't know that I noticed any blind cattle. I am not prepared to say that there were any blind cattle in the herd. There were numerous cattle in that herd too thin to ship. I cannot estimate how many. I understand by unmerchantable cattle, cattle that are not in shipping conditions, that are sway-backed, sore-footed and so forth. Sway-backs, lump-jaws, cripples, runts, stags and blind cattle and cattle too thin to ship are the only classes of cattle which might be considered unmerchantable. I made my estimate of those cattle by riding through them back and forth and by my knowledge of handling cattle and estimating their condition and quality by looking them through most of my grown life. My

(Testimony of James A. Johnston.)

duty as manager of Clay, Robinson's Denver branch is to direct and control the office at that point and my particular duty is loaning money on livestock. Whenever it is necessary for me to do so I go out on horseback into herds of cattle to inspect those cattle. Within the past five years I have rarely gone out on horseback among cattle for the purpose of inspecting them. I usually drive in a conveyance in going to inspect cattle. I rarely ever go on horseback, I'd rather look at them bunched up or in yards or from a conveyance. Whenever emergency calls me I go, and sometimes I don't go probably out in a year. Other times I go several times in a year. It is very hard for me to tell how often in the last five years such emergencies have [161] occurred. I have made five inspections of this nature during the last year. This was the only time I made an inspection on horseback during the last year. I think the only time I was on horseback probably in the last five years inspecting cattle was this time. The two times that I was in Mexico last year was the only times in the last five years I have inspected cattle in old Mexico. I inspected a herd of cattle in Mexico before, during 1883-4.

Q. Now, I'll ask you another question; how many short ages, by that I mean how many cattle under two years of age was in that herd you inspected on May 9th?

A. I would make the same answer as I have made to other questions, that I didn't count them. There were a number of short ages, number of yearlings,

(Testimony of James A. Johnston.)

too. I arrive at the age of cattle by the growth of their horns and also their size and general looks, that every cattleman becomes conversant with who handles many cattle.

Q. Are those tests infallible tests, in other words, are they such tests as never fail?

A. Well, it's what you rely on. I distinguish between a yearling and a two year old by the growth of their horns and their size and general looks. The yearling has a much shorter horn than a two year old naturally. It is a fact that different kinds of cattle have different sizes of horns. It might be true in certain cases a certain grade of cattle that would be a year old would have longer horns and larger horns than another kind of cattle of three years old. But we base our judgment on the quality of the cattle. I think they depend on an examination of the teeth more or less. It is usually considered a test of the age of Mexican cattle.

Q. Do you know in what respect the teeth of a two year old steer differs from the teeth of a yearling?

A. No, sir.

Mr. STONEMAN.—In Mexico or in the United States?

Mr. BARRY.—In Mexico. [162]

Q. You don't? A. No.

Q. You therefore wish the jury to understand that you are not capable of determining the age of Mexican cattle by the only infallible rule for determining the age of such cattle?

Mr. KNOLLENBERG.—Now, your Honor, we ob-

(Testimony of James A. Johnston.)

ject to counsel testifying as to the only infallible rule.

The COURT.—The objection is sustained.

Defendant excepts.

Mr. BARRY.—I think, your Honor, that he testified that was regarded as the only infallible rule.

The COURT.—I didn't so understand it. I understood him to say that it was a test.

I do not regard the method of testing the age of cattle by their teeth as the best method of arriving at their ages. I regard their general looks and their size, growth, the quality and breeding considered as the best method of arriving at the age of cattle. There is no particular test by which a person can determine beyond a doubt the age of Mexican cattle beyond what I have stated. The size and general make-up of the animal enables us to determine approximately what their ages are. It comes near enough for us to determine ages for classifying them. I have handled a great number of Terrazas cattle. I do not know what Terrazas cattle were worth in the Denver market in May, 1913.

I've met T. J. Donohue of the Donohue, ——Co. of Omaha, Nebraska. I thing I met Mr. Donohue in Denver on or about the 27th of May last year.

I stated in my direct examination that in the herd of cattle tendered to Mr. Hall on May 9th in Mexico by the defendant that the cattle so tendered were not as good or better than Terrazas cattle.

I did not tell Mr. Donohue in Denver on or about the 27th of May, [163] that if the defendants had offered to Hall certain cattle such as he then showed

(Testimony of James A. Johnston.)

me as having purchased from the defendant that I would have been glad to accept such cattle. When I inspected the cattle in Mexico on May 9th, Mr. Oliver did not tell me that those cattle were up to the contract.

We buy cattle on orders. These cattle were ordered, a thousand head, I think, for H. W. Moore of Brush, Colorado, who accompanied me on the first trip to Mexico. The balance of them was to go to a man by the name of Tainter of New York City who has a ranch in Montana. We had purchased these cattle from Hall at \$28 per head, counted off the cars in Denver. We were to pay the freight, and other charges.

Q. What prices did you sell these cattle to H. W. Moore for?

A. We don't buy cattle on speculation. We simply get a commission. We do a commission business. Our business is exclusively commission business. And we just simply get our regular commission for transacting this business for these people for handling their order. Our regular commission is \$15 a car. After I had seen those cattle on the 9th of May I told Mr. Oliver that they weren't the cattle that I had contracted and consequently couldn't take them. The deal wasn't called off at that time, only in so far as this particular bunch of cattle that was offered for delivery. I can't give you the exact date when the deal was finally called off, but it was later on when I was informed that I couldn't get the cattle that I had contracted for. I think it was some time in the next

(Testimony of James A. Johnston.)

thirty days. I remember I had to look other wheres to get the cattle.

Q. Do you remember whether it was after or before the 13th of May when it was finally called off?

A. I can't answer as to the exact date. Our contract with Mr. Hall provided for the payment by me of \$8,000. I paid that \$8,000 about April [164] 17, 1913. Mr. Hall paid us back in money the \$8,000, every dollar of it, before the close of this last year, of 1913.

I have no interest whatever in this litigation. I have no prejudice in the matter at all. I simply contracted for certain cattle and when they were offered me for delivery I couldn't accept them. The company I represent will lose or benefit in case a judgment should be given for the plaintiff or defendant in this action only in so far as my expenses in coming down here, two trips, and the additional expense of getting cattle to fill our orders which left us very little out of the transaction.

We had orders from these two people that I mentioned to secure for them so many cattle and when we failed to get the cattle that were tendered us near Nogales, we had to secure other cattle to fill those orders, which entailed additional expense. You can't do these things without expense, in traveling over the country, and telegraphing and that kind of thing and finding and locating the cattle. It wasn't anything serious, any great amount. These expenses are already charged up to our regular office expenses and we never expect to get any return in

(Testimony of James A. Johnston.)

any way whatever for the money that we have paid out. In other words, Mr. Hall owes us absolutely nothing, and whether he wins or loses, it makes no difference with us. Mr. Hall has made no promise whatever to refund to us such expenses as have been incurred in case he should win this law suit.

Q. Did you have a conversation with Ramon Elias at the ranch in Mexico on May 9th, in which you asked Mr. Elias what he was selling such cattle as had been tendered for delivery on that date?

Mr. STONEMAN.—We object to that question as absolutely immaterial and incompetent for the purpose of proving or disproving any of [165] the issues in this case, and not proper cross-examination.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

Mr. STONEMAN.—And it not being further shown that the attempt is being made for the purpose of impeachment.

The COURT.—Any further questions?

Mr. BARRY.—That is all.

Redirect Examination.

(By Mr. STONEMAN.)

Q. Do you know whether or not the market price of cattle of a grade as good as or better than Terrazas cattle in Denver was ever less than twenty-three dollars a head during the year 1913?

Mr. SEABURY.—Object, your Honor, upon the ground that the witness has testified that he did not know what the price was, and, therefore, cannot testify as to this question.

(Testimony of James A. Johnston.)

Mr. STONEMAN.—The question was as to whether or not the witness knew the price in the Denver market of Terrazas cattle in May, and he said he did not. The witness may not know the absolute market price, whether it is twenty-three, twenty-four or twenty-four and a half dollars in May, but he may be able to testify whether it was less than a minimum price in May, 1913.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

(Question read: “Do you know whether or not the market price of cattle of a grade as good as or better than Terrazas cattle in Denver was ever less than twenty-three dollars a head during the year 1913?”)

(By Mr. STONEMAN.)

Q. I will add to that, the grade being based upon the fact that they were two year old steers.

A. I don't think that cattle of that class were selling for less than twenty-three dollars [166] a head during the year.

Some of those cattle in that bunch were under age. Some of them were tender-footed, and therefore unmerchantable, some of them were sway-backs, some were too thin to ship, some of them were under age, I so considered them, and some of them were of a grade not as good as or better than Terrazas cattle. (By Mr. STONEMAN.)

Q. And for all of those reasons you mean to be understood as saying that eighty per cent of the cattle were either under age, sway-backs, lump-jaws, cripples, unmerchantable cattle, under two years of

(Testimony of James A. Johnston.)

age, or not up to the general grade of Terrazas cattle at that time in Mexico.

Mr. SEABURY.—The same objection.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. I do.

(By Mr. STONEMAN.)

Since 1884 when I inspected Mexican cattle in Mexico I have had occasion to inspect Mexican cattle in the Denver yards—a great many. I have had occasion to inspect Mexican cattle of what is known as Terrazas cattle in Denver during the last five years. That inspection was made in the performance of my duties as I have described them to counsel on the other side, that is, for the purpose of determining whether they were good collateral for loans.

Mr. STONEMAN.—That is all.

Recross-examination.

(By Mr. BARRY.)

When I testified that I thought that Terrazas cattle were not offered for sale in the Denver market for less than twenty-three dollars per head, I did not mean that the cattle that were being offered for twenty-three dollars in Nogales, Arizona, would [167] be offered at the same price in Denver. Usually the freight would be added, if they were contract cattle.

Mr. BARRY.—That is all.

Mr. STONEMAN.—That is all.

The COURT.—The witness is excused.

[Testimony of W. L. Howe, for Plaintiff.]

W. L. HOWE, called as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is W. L. Howe. I am working for Mr. Hall in the cattle business. I have been engaged in the cattle business about twenty years, continuously. During the last twenty years I have inspected cattle in old Mexico. I have received and shipped cattle out of old Mexico, State of Chihuahua. I have been working cattle in the State of Chihuahua about four years. I am acquainted with the grade of cattle known as Terrazas cattle. Well, I have been in the corrals in El Paso—the stockyards where they are brought in and classified, and have helped classify them and have handled them there, and have also handled them in Mexico. I know the general average grade of what is known as Terrazas cattle.

I know K. D. Oliver, Mr. Johnston, Mr. Kibbey and Ramon Elias.

On the 9th day of May, 1913, I was with Mr. Oliver, Mr. Johnston, Mr. Ramon Elias and Mr. J. Beckford Kibbey, Jr., at the Distillidero ranch. I went there to cut those cattle—the cattle that Mr. Kibbey and Mr. Elias were to turn over to Mr. Oliver.

I should judge between seven and eight hundred head were in that bunch of what I seen. I did not

(Testimony of W. L. Howe.)

ride through that bunch for the purpose of looking over the cattle. I saw the cattle and helped hold the cattle in the yard while Mr. Johnston and [168] Mr. Oliver were riding through. I helped herd them.

I have seen that contract or a copy of it before. (After examining Plaintiff's Exhibit "A.")

It would be pretty hard to say, but I judge from what I seen of them that there was possibly three or four hundred that was as good as Terrazas cattle. A train-load is generally considered fifteen cars. About fifty two year old cattle of the grade known as Terrazas cattle can be loaded in a forty-foot cattle car—approximately. About seven or eight hundred cattle. In that bunch there were quite a bunch that were yearlings—quite a lot of them. I mean by yearlings that they were long yearlings and not full two's. In that rejected part there were a good many that were not as good as Terrazas cattle. The Terrazas cattle in general are of a very good color, and are larger boned than the cattle I seen, and in a general way they are better cattle—larger framed. There were a great many sore footed. You cannot ship sore-footed cattle. I would say that there were quite a few of the sore-footed cattle that were unmerchantable. There were a great many under two years old. As near as I seen there were no sway-backs. There were some cattle too thin to ship. There were no cripples, blinds or lump-jaws that I seen. Some few runts, yes, sir; but stags or bulls, I don't think I seen any.

(Testimony of W. L. Howe.)

Q. And there were some cattle of that rejected portion, were there not, Mr. Howe, which were neither runts, stags, bulls, sway-backs, lump-jaws, cattle too thin to ship, or otherwise unmerchantable, and which were two years old, which nevertheless were not up to the grade of Terrazas cattle?

A. Well, in my opinion, I don't think the average of the cattle was up to the grade of Terrazas cattle. I think between three hundred and fifty and four hundred were as good or better than Terrazas cattle.

Mr. STONEMAN.—You may cross-examine.

Cross-examination. [169]

(By Mr. BARRY.)

There were in that herd between seven and eight hundred head of cattle. I arrive at that number as follows: In the first place Mr. Kibbey said when we came up that there were about six hundred head in the herd at that time, and they were cutting a herd at that time of older cattle—of four year old cattle—three's and four's in the bunch possibly three or four hundred yards away from the two year old herd.

Mr. STONEMAN.—Will you, gentlemen, let me withdraw my submission to cross-examination for the purpose of asking another question?

Mr. BARRY.—(Makes no objection.)

(By Mr. STONEMAN.)

On May 9th, 1913, Mr. Johnston, Mr. Oliver and myself and Mr. Kibbey were in the park across from the hotel fixing to catch a train back from Nogales to Tucson and Mr. Kibbey made the remark that he was sorry that the stuff did not suit, but if Mr. Oli-

(Testimony of W. L. Howe.)

ver and Mr. Johnston would be in Nogales on or about the 25th, as near as I can remember, he would bring up two thousand head or twenty-five hundred head of two year old cattle. I well remember the remark that he said: If I buy, beg or steal them, to Mr. Oliver. I never heard anything said at that time by Mr. Kibbey concerning the question or whether or not the cattle just inspected were sufficient in numbers to constitute a carload—a train-load of full two year olds under the contract. There were no four's in the bunch with the two year olds. There were some four year olds that were being cut on the top of the hill that we were holding. I did not hear Mr. Kibbey say at any time that those were being cut for the purpose of complying with the contract.

Mr. STONEMAN.—That is all.

(By Mr. BARRY.)

I was present at the ranch when they were inspecting this herd [170] of cattle on the 9th.

Q. Is it not a fact that during the greater part of the time that they were inspecting this herd of cattle that you were having your dinner over in the kitchen, or wherever they cook their meals?

A. I had dinner with Mr. Kibbey and Mr. Oliver.

Q. You say that there were between seven and eight hundred head of cattle in the pasture at that time?

A. I said what was throwed together—I don't know what was in the pasture. I arrived at that number as follows: On arrival we were speaking of

(Testimony of W. L. Howe.)

the cattle and Mr. Kibbey said there were about six hundred head, and when they cut the herd on the hill that threw three year olds in the bunch. How many, I don't know, but I said there were about seven hundred head in the herd. Yes, and I had an idea of what was there. I have seen herds together a number of times; I had an idea of my own outside of what Mr. Kibbey said, and I judged that there were that many there—seven or eight hundred. I would swear that there was not a thousand head in the herd thrown together.

Between three hundred and fifty and four hundred head of cattle in that herd were as good as or better than Terrazas cattle. In other words, about fifty per cent of those cattle were as good as Terrazas cattle. About fifty per cent.

I did not ride through the herd to make an inspection. I don't know how many runts there were. I rode around the herd and was mixed in the cattle all the time they were looking at the cattle, and I judged from what I seen of short ages and runts and thin cattle that about fifty per cent were merchantable cattle they could ship and fill the contract. I did not go down at that time for the purpose of making an inspection. I was along to ship the cattle and also to help Mr. Oliver cut them. I had nothing to do with the inspection of the cattle. I make a rule to pay much attention to the grade when I am out. There [171] were a bunch of yearlings. I don't know how many. There are different ways of telling a yearling from a two year old—a man's judg-

(Testimony of W. L. Howe.)

ment. He would naturally take in the appearances, but if he had to look at the animal, he would tooth it. The best way to tell the age is by tothing it. In inspecting Mexican cattle it is a fact that the general appearance is very frequently deceptive if the cattle are very thin and have not had a good growth.

Q. And in a great many instances what might be regarded as yearlings are as a matter of fact two year olds?

A. Well, there could be a few two year olds that would be overlooked the same as native cattle, but, taking them all the way through, the general appearance would not fool you.

By tothing I mean looking at the teeth to see their ages. I did not inspect any of the cattle down there on the 9th of May. I could not swear positively that those cattle I regarded as yearlings were in fact yearlings.

The period of calving in Northern Sonora is from March, April and May, and, then again, through the months of September, October, November for the late calves. There is a per cent from January—a small per cent from January to March, and the greater per cent is from March, April and May. I should not think that seventy-five per cent of the calves born in Northern Sonora are born during the first five months of the year. I don't know; I could not say. The per cent would be according to the seasons, and the season they had beforehand. If they had good seasons and the season was a good season beforehand, there would be a possible chance

(Testimony of W. L. Howe.)

of seventy-five per cent being born in the first five months; and if there was not, there would not be.

Mr. STONEMAN.—I will state for the purpose of the record, if your [172] Honor please, that the witness James Gillespie is not present, and under the stipulation to the effect that as to such witnesses as are not present the affidavit may be read before the jury, under the stipulation that if the witness were present he would testify as set forth in this affidavit, I now desire to read the statement in this affidavit as to the testimony that James Gillespie would give if he were present.

(To the jury.) Without repeating, gentlemen, the stipulation, I will say briefly that it is conceded by the stipulation that the witness James Gillespie, if present, would testify to these facts.

Mr. SEABURY.—May we add to that that we at no time concede the truth of the statement, but only that the witness would so testify.

Mr. STONEMAN.—That is my understanding of the extent of the stipulation.

(To the jury.) It is agreed (reads): “That if the witness James Gillespie were present he would testify that he is a rancher and cattleman of many years’ experience, having been engaged in the purchase and sale of cattle, and is competent to testify as to the grades, brands, sizes, ages and quality of cattle that are at all times hereinafter mentioned; that he is familiar with the grade of the Terrazas cattle, and that he is familiar with the terms of the contract sued upon;

(Testimony of W. L. Howe.)

That he went to the ranch of the defendant on or about May 13th, 1913, in company with Ramon Elias, K. D. Oliver, and this affiant; that he inspected the herd of cattle gathered which Elias said were gathered for delivery under the contract sued upon; that from his inspection of the herd and his knowledge of the cattle business, the said cattle were not up to the grade of the Terrazas cattle, nor was there a sufficient number of the ages specified in the contract, nor of the brands or quality to comply [173] with the contract, in this, to wit, that there were not exceeding four hundred head of cattle so at said time tendered of the ages, sizes, brands, grades and quality required under the terms of the said contract, and that it was impossible for affiant or his agents to cut from said herd of cattle a train-load of cattle of the kind and quality required under said contract, or any number of such cattle over four hundred head."

Mr. STONEMAN.—If your Honor please, it is necessary for us to prove, from our view of it, only the citizenship of Myers. If it would not subject us to any suspicion, in the record, of collusion in this case, I would suggest that it be stipulated between counsel for the defendant and ourselves that the said E. W. Myers is now, and was at all times, a citizen of the State of Texas.

Mr. SEABURY.—We so stipulate, if your Honor please; there is no use of wasting time to prove the fact.

Mr. SEABURY.—If your Honor please, I would

(Testimony of W. L. Howe.)

like the privilege of asking Mr. Hall a few questions in the nature of cross-examination, which I omitted to ask him, if your Honor will accord me the privilege, if counsel do not object, I will appreciate it.

Mr. STONEMAN.—There is no objection.

The COURT.—Permission is granted.

**[Testimony of John G. Hall, in His Own Behalf
(Recalled).]**

Mr. JOHN G. HALL, being recalled, testified as follows:

Recross-examination.

(By Mr. SEABURY.)

I have made no other contract than Defendant's Exhibit "O," which is the contract between myself and the Clay, Robinson Company, with reference to the purchase of the cattle which Myers was under contract to deliver to me.

Q. Isn't it a fact, Mr. Hall, that at the conversation on May 14, [174] 1913, that you had with Mr. Kibbey at the Montezuma Hotel, that you proposed to Mr. Kibbey that you would allow him to retain four thousand dollars, and allow him to return to you six thousand dollars in the fall, provided he would sell you a thousand head of steers, deliverable in the fall, at the price of thirty-two dollars per head?

A. No, sir, I never consented to allow him to hold one cent of my money.

Q. What agreement did you make with reference to that at that time?

A. The agreement that we made was that he was to deliver to me a thousand head of steers, three and

(Testimony of John G. Hall.)

four year olds—I won't say four year olds. I think Mr. Kibbey stated that he would not make them all fours. I considered any kind of a settlement that would avoid a lawsuit was a good way, and accepted his proposition to deliver me a thousand four year olds in the fall and give me a contract showing the receipt of ten thousand dollars advanced on that contract. And that was the only proposition that we agreed upon. He agreed to do that, and I agreed to accept it. He afterwards went back on it.

Mr. STONEMAN.—Q. You mean—was that agreement based upon any new consideration?

A. What do you mean by new consideration?

Q. Was it a proposal or a new contract—a proposal for avoiding trouble on the old contract?

Mr. SEABURY.—We object on the ground that it appears already from the statement made by Mr. Hall that it was a contract which comprised mutual promises, and that the mutual promises of each party was ample and sufficient to support the agreement.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. It was done as a compromise over this contract that is now in controversy, simply to avoid getting into a lawsuit.

Mr. STONEMAN.— [175] Q. Did you at that time, or at any other time, say to Mr. Kibbey or to Mr. Elias, that you would waive any right under the present contract?

A. No, sir.

Mr. SEABURY.—Will you wait, please, Mr. Hall,

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(Testimony of John G. Hall.)

until we have time to make our objections?

The WITNESS.—I beg your pardon.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the question is leading and not proper redirect examination.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Your answer?

A. No, sir.

Q. Did Mr. Kibbey or Mr. Elias deliver to you any other cattle under that proposed agreement, or under the first contract?

Mr. SEABURY.—We object to that, if your Honor please, in so far as the question relates to the delivery under the contract in the suit, upon the ground that it is already answered; and in so far as it relates to the contract to which Mr. Hall has just testified, on the ground that it is not within the pleadings in this action, and as such is incompetent.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Was there any delivery?

A. None whatever.

Q. As a matter of fact, on the 13th day of May, 1913, you received a letter from the Alamo Cattle Company stating that your contract was at an end?

A. Yes, sir.

Mr. SEABURY.—We object to the question as very leading and not proper redirect examination, and according to my recollection it is in contradiction of the record—the evidence in this case already.

(Testimony of John G. Hall.)

The COURT.—I will have to see the letter before I can rule on that. [176]

Mr. STONEMAN.—Letter under date of May 13, 1913; may I read it, your Honor?

The COURT.—It is not one that has been read?

Mr. STONEMAN.—Yes, sir, it is an exhibit in the case, Plaintiff's Exhibit "K." (Reads the letter to the Court.)

The COURT.—What date is that?

Mr. STONEMAN.—That letter is dated May 13, 1913, at Nogales, Arizona.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. You received that letter, did you not? A. Yes, sir.

Q. Now, this conversation to which counsel has directed your attention in further cross-examination; was that held on the 12th, preceding the date of this letter, or on the 13th, preceding the date of this letter? A. Preceding the date of that letter.

Mr. STONEMAN.—That is all, I think.

(Witness excused.)

Mr. STONEMAN.—The plaintiff rests.

Mr. SEABURY.—If your Honor please, is it desirable that the jury should be excused while motion for direction is made? I don't think I care to be heard at length in support of the application.

The COURT.—You may be heard a few minutes.

Gentlemen of the Jury, you will be excused until two o'clock. In the meantime, you will follow the in-

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structions I have heretofore given you. The jury
then withdrew.

Be it further remembered that thereupon the following proceedings were had herein:

Mr. SEABURY.—If your Honor please, I move, on behalf of the defendant, for a directed verdict in favor of the defendant and against the plaintiff; that the plaintiff take nothing by this [177] action against the defendant, on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendant, particularly upon the ground that there is evidence in the record which would tend to indicate that the plaintiff is not the real party in interest, it appearing that the plaintiff has sold and assigned the entire subject matter of the contract to Clay-Robinson Company, which fact indisputably appears by Defendant's Exhibit "O"; particularly also upon the further ground that it now appears from the evidence of the plaintiff that the contract which is the subject of suit in this action was in reality modified and changed by the making of an entirely new contract between this plaintiff and the defendant company on or about the 12th, 13th or 14th of May, 1913, at the city of Nogales; and that the contract which was then made between the plaintiff and the defendant is not the contract which is now the subject of suit in this action. In consequence of which there can be no recovery on the contract which is the subject of suit in this action.

(Then ensued argument on said motion.)

The COURT.—I will rule on the motion at two o'clock.

(Adjournment until two o'clock P. M.

(After recess.)

The COURT.—The motion made by defendant for a directed verdict in its favor is denied.

Mr. SEABURY.—The defendant excepts to the denial of the motion upon each of the grounds urged.

At 2:00 P. M., both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court, and thereupon the following further proceedings were had herein, to wit:

DEFENSE OPENS.

[Testimony of W. Beckford Kibbey, for Defendant.]

W. BECKFORD KIBBEY, called as a witness on behalf of the defendant, [178] having been previously sworn, testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is William Beckford Kibbey, Jr. I am a cattleman. I have been engaged with the Alamo Cattle Company for about a little over six years. Prior to that time I had some experience buying cattle for butcher shops. I am president of the Alamo Cattle Company. Mr. Elias and I are practically its joint owners. Mr. Elias and I are the only people who have authority to make contracts for and on behalf of the Alamo Cattle Company.

I know Mr. Hall, Mr. Ed. Myers and Mr. Oliver.

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(Testimony of W. Beckford Kibbey.)

I have been engaged for six years in the purchase and sale of Mexican cattle, and am familiar with them.

I signed the contract, Plaintiff's Exhibit "A" in this case, between the Alamo Cattle Company and Mr. E. W. Myers. We bought large numbers of cattle to comply with this contract. We made arrangements with numbers of people whose cattle we sold, as a general thing, on commission to put their cattle into these herds, and we advanced money on their contracts which were to be delivered later. I recall an occasion about the 6th of April, 1913, at which some of the persons representing Mr. Hall were present at our ranches in Mexico. Mr. Johnston, Mr. Elias and myself were present. In addition to that Mr. Johnston had another man with him whom he represented to be some one who was to buy the cattle from him as I recollect, but his name I don't recall. Mr. Oliver was also present at that time.

We left Magdalena and went out to one of our ranches named La Moraga. Mr. Oliver stated he was in a hurry to see the cattle and for us to have a rig rented, which we did and we went out to our corrals and saw a number of our cattle come in to water, and in addition to that we sent out a lot of cowboys to round up a lot of cattle that when rounded up consisted of a thousand head [179] or so. These cattle consisted of two year olds, one year old steers, such as the cowboys could gather. No effort was made to get in the exact cattle to comply with the contract.

(Testimony of W. Beckford Kibbey.)

Mr. Oliver accompanied by Mr. Johnston and the other gentleman and Mr. Elias and myself drove out there and examined the cattle. We got on horses and rode through the herd, and some of us rode through the herd twice and we pointed out to them such cattle as we considered came under the contract. In addition to that, wild cattle were coming to water and we also pointed out such cattle as we considered came under the contract, and, in traveling around the ranch, such cattle as we ran across we also pointed out to them as coming under the terms of the contract.

Mr. Oliver said practically nothing himself. He did state, however, that he wished to receive these cattle later than we had intended to deliver them, and he stated that if he would defer deliveries of these cattle until May that he would extend the time of our contract for thirty days more. He asked us at that time if we were in position to deliver a thousand head of four year old steers. We stated that we would prefer to reserve that until the last delivery, as in the herd we were buying we were separating all four year old steers for them. And we stated that we were ready at once to deliver a herd of two year old steers and he stated that feed was too short at that time, and he preferred not to receive them then. He said he would notify us as soon as possible as to when he would be ready to receive the two year olds. After April 6th I next did something with reference to supplying cattle under the contract, Plaintiff's Exhibit "A." About the 9th of May, 1913. After we

(Testimony of W. Beckford Kibbey.)

had received due notice from Mr. Oliver that he wanted a herd of cattle ready about May 10th, and having advised him that the herd would be ready to cut on May 9th, Mr. Oliver arrived at Nogales, to the best of my recollection, on the 9th of May, accompanied by Mr. Johnston, [180] and he was also accompanied by Mr. Howe, I think the name was, a shipper for Mr. Hall. Mr. Johnston was also present. These gentlemen, accompanied by myself, and a man from Imperial Valley named William Farr, went to Distillidero for the purpose of examining the herd of cattle we had gathered. Of this herd about 800 had been set aside for Mr. Farr. We asked Mr. Oliver on his arrival if he cared to receive the four year old steers that were in the herd that we were about to offer to Mr. Farr. We asked Mr. Oliver whether he had any objection to our selling this herd of cattle which consisted of about 800 head of three and four year old steers, of which the majority were four year old steers, to Mr. William Farr. Mr. Oliver then asked me whether we would have sufficient four year old steers at the end of the season to complete our contract for four year old steers, and I said I thought we would. He said, "In that case, I have no objection to your selling these cattle to Mr. Farr." We then told Mr. Farr he could have the cattle. Whereupon Mr. Farr went into the herd and cut 560 head of three and four year old steers which he received and shipped to Imperial Valley. The remainder of the herd, consisting of about 1400 head was then tendered to Mr. Oliver. Mr. Oliver and

(Testimony of W. Beckford Kibbey.)

also Mr. Johnston rode through the herd. Originally, I went over to see about Mr. Farr's cutting the herd so that Mr. Oliver and Mr. Johnston had already examined the herd. When I returned, I asked Mr. Johnston what he thought of the herd. He stated that he thought there was a good many short ages in the herd. I explained to him that at that time of the year there practically could be no short ages among cattle that was supposed to be two years old, owing to the fact that calves are born much earlier in Sonora than they are in the United States or especially in Colorado. That, practically, the entire calf crop is born before the 13th of May, I should say probably three-fourths of the entire crop is born after the 13th of May, [181] each year, and I told him it was practically impossible that there could be any great number of short two year old steers in the herd for that reason. He then stated that the cattle were sore-footed. I replied that I thought he was mistaken about that, simply because the cattle were very tame and a great many of them were lying down. I explained to him that the fact that they were lying down did not mean that they were sore-footed, but merely tame. About that time Mr. Oliver came up and joined us and I asked Mr. Oliver if he didn't think that the herd was all right, and he told Mr. Johnston that he thought the herd would be all right and would ship all right. The principal objection that Mr. Johnston seemed to make to the cattle was that they were sore-footed and would not ship. Mr. Oliver stated that he

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(Testimony of W. Beckford Kibbey.)
thought they would ship.

At that time Mr. Oliver made no objection to the cattle. Later on Mr. Oliver, possibly half an hour after this had occurred, Mr. Oliver took me to one side and told me that he didn't think that the cattle came up to the contract and he asked what we had better do about the matter. I told him that I thought that the cattle complied with the contract in every way and he suggested that we go to town and discuss the matter there. We thereupon got into automobiles and went back to town. A minute before we left the Distillidero Ranch, Mr. Elias, and to the best of my recollection, Mr. Tankersley, had arrived in another automobile from Magdalena, so that Mr. Elias also conferred with Mr. Oliver on this trip. On our arrival at Nogales, Mr. Oliver stated that he had to go to Tucson in order to meet another man he expected there. That if Mr. Johnston didn't take the cattle that he had a man from New York who would take them. He asked us to hold the herd for three days until he could decide on the man.

Mr. Oliver stated that it would be very much preferable, in [182] view of the contract which they had to deliver these cattle in large bunches and if we could deliver two thousand or twenty-five hundred head of cattle about the 25th of the month. I said that I believed we could do it, but I referred Mr. Oliver to Mr. Elias, who had entire charge of our cattle sales, and Mr. Elias buys and sells all cattle for the company. I merely assist him occasionally in this business. To the best of my recollec-

(Testimony of W. Beckford Kibbey.)

tion that is all that was said with reference to the order for 2500 head of cattle about May 25th. The matter was left in the air. Mr. Oliver stated that he was going to Tucson and would let us know further exactly what to expect and asked us to let the cattle to run. I agreed to do this. Instead of returning Mr. Oliver sent me a telegram or sent the Alamo Cattle Company, I am not positive which, a telegram, in which he stated that he was going to El Paso and would advise us fully further. On receipt of this telegram, we didn't know what to do with the cattle. Mr. Oliver hadn't definitely turned them down, but had simply asked us to hold them, so we continued to hold them. The next notice we had was a telegram from Mr. Hall, dated, to the best of my recollection, about the 11th of May, stating that he would arrive in Nogales about the 12th, I think, in order to receive any cattle that complied with the contract. Mr. Hall duly arrived about the 12th of May and he went out to the Distillidero Ranch. At that time *there with him* a Mr. Gillespie, Mr. Elias and Mr. Myers. I was thinking that Mr. Tankersley was with them, but I am not positive. I wasn't present. I didn't go out to the ranch on the 13th. To the best of my recollection I went out neither on the 12th or the 13th. I wasn't present at any time that Mr. Hall saw the cattle. Mr. Oliver was present on the 12th or 13th. I had a conversation with both Mr. Hall and Mr. Oliver about the 12th or 13th of May, the day that they returned from the Distillidero Ranch. It was [183] after they had inspected

(Testimony of W. Beckford Kibbey.)

the cattle. Mr. Elias was present part of the time. Mr. Oliver and Mr. Hall were present, to the best of my recollection, all the time and I was present all the time. We discussed the question of whether or not we could come to some agreement regarding the delivery of these cattle. I stated that I believe the cattle came up to the contract in every way, but I stated, we had never had any trouble with any of our buyers up to that time and we preferred to waive our rights rather than have any. I stated that furthermore that Mr. Oliver and I had been personal friends for a good many years and I particularly did not want to get into any trouble with him. I told them first that if they would let us have half the deposit, \$5,000, we would return them the balance. They objected to this. Finally, on Mr. Oliver's solicitation, I said that I would cut that down to \$4,000 and we would return them \$6,000. I stated, however, that it would be impossible for us to pay that amount of money to them until such time as we had realized on one of these herds, because all our ready cash was tied up in cattle and we were depending on this herd of cattle we had already bought for money to really pay for other herds we had contracted for at a low rate and we were short of ready money. Mr. Oliver then made the suggestion if we would deliver them one thousand head of three and four year old steers in the fall at \$32 a head, that in that way we would get \$4000 over and above the contract price that we had sold them for—four year old steers at that time, and he asked me whether that would be satisfactory

(Testimony of W. Beckford Kibbey.)

or not. I told Mr. Oliver that it was absolutely impossible for me to make any arrangement, unless I consulted Mr. Myers, because Mr. Myers I considered was a party in these contracts and his interests had to be taken care of. I told him, however, I would speak to Mr. Myers and get his decision. I then went downstairs and asked Mr. Myers to come up with me, so we could thrash the whole matter [184] out between the whole lot of us.

I said, "Gentlemen, in this proposition we want all the cards on the table. Anything I want to say, I want to say before you all." I then outlined the proposition that Mr. Oliver and Mr. Hall had made me in regard to these cattle and I asked whether it was satisfactory to all present. There was nothing said by Mr. Oliver or Mr. Hall. Mr. Myers stated he would have to talk the matter over with his partner, Mr. Tankersley, and would be unable to give us his decision at that time. Mr. Myers then left the room. The only thing that was then done was that I agreed with Mr. Oliver and Mr. Hall was to go to Tucson—they stated they had to go to Tucson that night and they asked me to let them know what Mr. Myer's decision was as soon as I got it. That same evening after Mr. Oliver and Mr. Hall left on the train I wired them.

Q. I now show you what purports to be a telegram, dated May 13, 1913, addressed to K. D. Oliver, at El Paso and purporting to be signed by the Alamo Cattle Company, by Kibbey, President. (Defendant's 8 for identification.)

(Testimony of W. Beckford Kibbey.)

A. That is the telegram that I sent.

Mr. SEABURY.—Now, I offer that in evidence.

Received in evidence and marked Defendant's Exhibit 8.

Mr. SEABURY.—(Reads exhibit to the jury as follows:) "K. D. Oliver, Nogales, May 13th, via Tucson, Az., May 14th,"—whatever that means,— "K. D. Oliver, El Paso, Texas. Myers refuses to compromise. Advise if you wish to go ahead with our verbal agreement. Alamo Cattle Company, Kibbey, President."

I did not receive any communciation from Mr. Oliver or Mr. Hall in response to that. No direct response at least. Merely, the other letters offered here, other letters and telegrams offered here in evidence that were received. It's a question as to whether they relate to this subject or not. I received no [185] response to this telegram. This telegram was ignored, as far as I know. There was another telegram received from them to the best of my recollection about the 14th, stating they were ready and willing to receive all cattle that came under the contract between the 29th of May and the 1st of June. That telegram was received by us after they had left Nogales on the 13th of May or 14th. I have told you the more important points of the conversation on the 13th with Mr. Hall and Mr. Oliver. The conversation lasted for nearly a day and a half. There may be other matters that I don't recollect just at the present time. I have given you the gist of the matter. It is my recollection of the matter that on

(Testimony of W. Beckford Kibbey.)

the 9th, Mr. Oliver in the presence of Mr. Johnston said that the cattle were up to the contract. But later he took me aside and said they were not up to the contract. He was endeavoring to sell the cattle to Mr. Johnston in the first instance. When Mr. Oliver took me aside and told me he didn't think the cattle were up to the contract, I said the cattle were up to the contract. It is not true, as stated by Mr. Oliver here on the stand yesterday, that when he told me privately that the cattle were not up to the contract that I agreed with him finally and said that they were not up to the contract. I told him exactly what I said I detailed to Mr. Johnston, repeated the same arguments regarding the cattle to Mr. Oliver that I did to Mr. Johnston previously. I did not at that time or any other say to Mr. Oliver or Mr. Hall in substance that the cattle which we offered to these gentlemen on the 13th of May were not up to the requirements of your contract with Mr. Hall. They stated that there were too many short ages among them; they stated that a large number of the cattle were sore-footed. Those were the only objections that I recollect. I participated in counting the herd I offered to these gentlemen on the 13th of May. There were almost exactly two thousand three hundred head of cattle in the entire lot. Of this entire lot, between 700 and 800 [186] head were offered to Mr. William Farr. He took 690 head and cut back 135 head. I have a distinct recollection of that. That would leave something over 1400 head of cattle left in the herd that was offered to Mr. Oliver on that

(Testimony of W. Beckford Kibbey.)

day. In my opinion as a cattleman there unquestionably was a train-load in the herd presented to Mr. Oliver on May 9th. There was in my opinion unquestionably a train-load of cattle that would come under the terms of the contract, ready for delivery at the Distillidero Ranch on May 9th. A train-load of cattle is from 15 to 20 cars or anywhere up to 45 cars, as far as that is concerned, of cattle. A train-load is usually considered by its minimum number, which is 15 cars, which means 15, 36-foot cars ordinarily. The usual number of two year old steers that such a car would contain depends very largely on the flesh the animals are in and the time of year. Two year olds are considerably bigger just before they are three's, than when they are three's, but the cattle we have described at that time of the year, carload should be 40 to 42 head to the car. Fifteen cars at 42 would be a little over 600 head, say between six and seven hundred head, to be safe. I can't say that I observed any runts among these cattle that I offered to Mr. Hall on the 9th of May. It is always a matter of opinion as to what constitutes a runt. There may have been a few stags. It is impossible to clean a herd absolutely *exactly*. That also is a question as to whether an animal is a stag or not is a matter of opinion. I did not observe any substantial number of either runts or stags. I think there were no cripples as far as I saw. I think there were no lump-jaws. As to sway-backs, that is also a matter of opinion, because it depends on how badly sway-back a steer is, whether a buyer will refuse

(Testimony of W. Beckford Kibbey.)

them. There might have been a few in the herd that would be considered sway-backs. I did not find any substantial number. I did not find any blind cattle. There were no cattle in that herd that were too thin to ship. As a matter of [187] fact, about ten days after the greater part of them were shipped to Canada. I mean to say there was something over four hundred head out of that herd, two year old steers shipped to Canada.

Mr. Oliver, Mr. Elias, Mr. Johnston, another gentleman, and I were present on April 6th at the inspection of these cattle. The cattle which we submitted to Mr. Oliver and Mr. Johnston on April 6th, 1913, we left on the ranch where they saw them until we received notice from Mr. Hall that they were ready to receive the cattle. We then gathered these cattle up and drove them to the Distillidero Ranch, where we placed them in the herd which they were to receive on May 9th. No cattle were cut out of that herd. No cattle were sold by us between the dates of April 6th and May 9th. It is a fact that the herd which I showed to the plaintiff and Mr. Oliver on the 9th of May comprised and included the cattle which were shown to Mr. Oliver and Mrs. Johnston on the 6th of April, 1913, with the possible exception of such cattle as we may have failed to round up which was a very small number if any. I counted the herd of cattle which I tendered to plaintiff on the 9th of May, 1913. It is a very difficult thing to say what percentage of a herd comes up to contract without actually cutting the cattle, but in my opinion I

(Testimony of W. Beckford Kibbey.)

should say that at least three-fourths of those cattle would come up to the contract.

I was present when Mr. Oliver was asked to cut the cattle. As near as I could make out, it wasn't Mr. Oliver who was cutting the cattle, but Mr. Johnston. I think I have said everything practically that was said about the cattle. Mr. Oliver endeavored to get Mr. Johnston to take the cattle at first and he stated there was no indifference on Mr. Oliver's part and said that he wouldn't take the cattle. He simply asked me to hold the cattle for three days, until he could bring another buyer out to see them. The question apparently wasn't whether or not the cattle was as good as the contract called for, but whether Mr. Johnston or whether [188] the other man he stated was in Tuscon would take them. I did not notice any substantial quantity of unmerchantable cattle in the herd of May 9th. The herd had already been cut and to the best of our knowledge and belief had been placed in condition. It had had a fifteen per cent cut before they were shown to Mr. Oliver and Mr. Johnston and a large number of unmerchantable and young cattle had already been cut out of this herd. After counting them I sent them out in one corner of our large pasture where they were just herded by about 20 cowboys until such time as we should hear further from Mr. Oliver on the subject. I received a telegram from Mr. Hall in which he stated he would be there, to the best of my recollection about the 12th of May. After Mr. Hall left Nogales about the 13th or 14th of May this took place there-

(Testimony of W. Beckford Kibbey.)

after between me and him. In the first place, we sent Mr. Hall a letter stating that his two herds had been tendered to him which he refused to receive, and we considered the contract canceled. To the best of my recollection, on the same date, we received a telegram from him stating he was ready and anxious to receive the cattle coming under the contract on the 29th of May, between the 29th of May and the 1st of June. Having notified Mr. Hall that we no longer considered the contract in force, we proceeded to sell these cattle. We sold a herd consisting of about one thousand head of cattle to Mr. T. J. Donohue. In that herd were about 750, I think the exact figure 733, head of two year old steers from this same herd. Of these about one-half of two year old steers and part of the three year old steers, 500 of them were shipped to Canada by Mr. Donohue. The price at which I sold this thousand head of cattle to Mr. Donohue was the same price as the contract, \$23 for two year old steers, to the best of my recollection. I am not positive whether we got \$28 or \$29 for the three and four year old steers. There were 733 head of two year old steers and there were something over 200 head of three [189] and four year old steers. There were, to the best of my recollection, about 960 head in the lot we sold Mr. Donohue.

Q. Now, for the purpose of fulfilling your contract with Mr. Hall, had you or had you not purchased and gathered approximately five thousand head of cattle?

Mr. STONEMAN.—We object to it as leading and suggestive.

(Testimony of W. Beckford Kibbey.)

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Tell us what you did with reference to the purchase and gathering of cattle for the performance of the contract with Mr. Hall.

Mr. STONEMAN.—I ask that the witness be confined to a time not other than has been already testified to. If he has made any endeavor to gather any other cattle.

Mr. SEABURY.—May I say, your Honor, that this is offered in support of our counterclaim. That is the purpose of it.

Mr. KNOLLENBERG.—If your Honor please, we object to the counsel introducing any evidence on the matter of his counterclaim, if that is the purpose of the question. According to the contract, or at least our view of the contract, which is admittedly made and executed by the defendant, the damages in that contract that there was a breach on our part has been liquidated and regardless of the damage which the defendants may have sustained by virtue of our breach of it, if we did breach it, have already been fixed by them, and they have made their bed and they must lie on it and therefore we object to counsel putting in any evidence to show any damages other than the damages that have been fixed in the contract.

Mr. SEABURY.—I direct your Honor's attention to a paragraph of this contract, which is the substance of the suit. Plaintiff's Exhibit "A," which says that: the seller hereby acknowledges receipt of ten thousand dollars, United States currency, in

(Testimony of W. Beckford Kibbey.)

hand paid [190] this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so, he shall forfeit the amount or amounts advanced under this contract. I observe that there is a period at that place. There was not statement of any kind of limitation to the effect that in no event could the defendant in this case, namely, the seller, be prejudiced by a breach of contract in excess of ten thousand dollars. We think that the following clause is of a different character. The following is this: The seller agrees to pay two dollars in addition to returning the forfeit on each head he fails to deliver on this contract, which shall constitute an entire claim for damages. In other words, the limitation on the recovery in this section was placed not on the seller, but on the buyer; and it was expressly provided by the contract that in no event should the seller recover more than two dollars per head for each head of cattle that was undelivered under the contract, plus the return of the two dollars per head out of the ten thousand dollars already received. I think there is just that difference between the two clauses. By the contract it is expressly limited that the entire claims for damages, as the expression goes, so far as the buyer is concerned, but so far as the seller is concerned, there is nothing in the contract to limit him from recovering the actual damages sustained over and above the ten thousand dollars. At this time I would like to make this one other point, if the Court please, so that the Court may not misunderstand our posi-

(Testimony of W. Beckford Kibbey.)

tion. We claim that so far as the ten thousand dollars is concerned, we don't have to establish actual damages to entitle us to retain the ten thousand dollars under the contract. That was the sum which the plaintiff fixed and agreed should be held if he failed to perform. If the jury finds that he failed to perform without proof of actual damage, we claim to be entitled to retain the [191] ten thousand dollars. If we sustained actual damages, we claim the right to recover such excess over and above the ten thousand dollars as were actually sustained as damages by the defendant in this case, and not exceeding seventy-three hundred dollars in excess of the ten thousand dollars.

The COURT.—That amount, ten thousand dollars, is to be held in liquidation of damages suffered by the seller if the buyer fails to perform the contract?

Mr. SEABURY.—The object was to absolutely assure the defendant.

The COURT.—I think that the \$10,000 was in full of all liquidated damages and I sustain the objection.

Mr. SEABURY.—We except. For the purpose of hurrying the trial, if your Honor please, may I make an offer to prove the allegations contained in the counterclaim, to which this objection was made, which was what I was about to do? Counsel objects to any evidence under the counterclaim. (To counsel for the plaintiff:) Am I right?

Mr. KNOLLENBERG.—Any evidence in support of the counterclaim.

The COURT.—For the purpose of the record, is

(Testimony of W. Beckford Kibbey.)

that a formal introduction of evidence in support of that?

Mr. SEABURY.—There may be a question as to that, and in view of the undisputed fact that Mr. Knollenberg's objection was to all evidence offered in support of the counterclaim, I prefer to have a record which would protect the defendant in that respect.

The COURT.—All right.

Mr. SEABURY.—We now offer to prove in support of the counterclaim the allegations contained in that portion of the answer which I understand counsel for the plaintiff objects to upon the ground that it is inadmissible under the contract which is the subject of the suit.

Mr. KNOLLENBERG.—Upon the ground particularly that the basis of the counterclaim is the written contract, which provides [192] for liquidated damages, and which he admits in paragraph 14 of his amended answer are liquidated damages, and under the admission in paragraph 14 and the contract, there can be no recovery for any other damages.

The COURT.—Have you finished?

Mr. SEABURY.—Yes, your Honor.

The COURT.—Sustained.

Mr. SEABURY.—We except.

(By Mr. SEABURY.)

Q. Mr. Kibbey, I show you Plaintiff's Exhibit "A," and ask you to tell us in whose handwriting the body of that contract is.

(Testimony of W. Beckford Kibbey.)

A. My own. All the handwriting on that is my handwriting except the signature of Ed. W. Myers, and except the date.

Q. Will you tell whether or not any of the terms of the contract which appear to be in writing were so made at the suggestion of yourself or Mr. Myers?

Mr. KNOLLENBERG.—We object to the question. It makes no difference at whose suggestion it was made. It was made and the contract speaks for itself. It is agreed to by the parties to the contract, and by the pleadings. We are bound by our pleadings. They admit we are bound, and admit that they are bound, and it would make no difference who made the suggestion.

Mr. SEABURY.—I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the handwriting of the defendant would be more strictly construed against that party. Now, if that is the case, I desire to examine this witness for the purpose of showing that the damages in this contract were made at the suggestion of the other party, namely, Mr. Myers, which would entirely dissipate that burden upon the defendant.

Mr. KNOLLENBERG.—I think counsel would be right, if he brings that knowledge home to the plaintiff, but if he does not, I think [193] we are bound by what the contract says, regardless of what Mr. Myers and Mr. Kibbey said outside. No verbal agreement made at the time or previous to this contract would vary or affect us in any respect, except,

(Testimony of W. Beckford Kibbey.)

of course, if they made a contemporaneous agreement that would also be a binding contract. That would change it.

Mr. SEABURY.—Of course, we don't wish to show modification of the agreement, your Honor. The rights of Mr. Hall can be no better than the rights of Mr. Myers, and in view of the rule of construction which has been urged against us, it seems to me we have a right to explain the circumstances under which the clauses were inserted, for the purpose of showing, if possible, that the responsibility and burden for these clauses did not necessarily rest with the defendant.

The COURT.—Well, I think, regardless of who may have written them or at whose suggestion they were incorporated in the contract, that the amount of damages which the defendant might recover was limited to ten thousand dollars. I sustain the objection.

Mr. SEABURY.—I except.

The cattle in the herd of May 9th were two year old steers. They were in a shipping condition, as we afterwards proved.

Mr. SEABURY.—I think that is all.

The COURT.—You may cross-examine.

Cross-examination.

(By Mr. STONEMAN.)

Q. You say they were in a shipping condition which you afterwards proved. How did you prove it?

A. By shipping over four hundred to Canada, and

(Testimony of W. Beckford Kibbey.)

four hundred to Omaha, and about four hundred to Denver. The herd was in two bunches, one bunch consisting of three and four year old steers, amounting to about seven hundred and fifty head, more or less, and the remainder of the [194] herd—the entire herd as counted afterwards amounted to two thousand three hundred, including the two herds, and of those there were about eight hundred and fifty head tendered to Mr. Farr, and about one hundred and thirty-five head were cut back. They were not put in the two year old herd, but were trimmed out. He cut those because he did not want them. I suppose there were some cattle he objected to. Some he thought were short ages—some cattle that did not exactly some under the contract. One hundred and thirty-five out of about eight hundred and fifty, more or less.

Q. You made two statements, Mr. Kibbey, as I recall your testimony, one to the effect that all cattle which you claim to have gathered and tendered on May 9th were two year olds and one to the effect that it was a mixed herd of two's and four's.

A. I explained it, I think, by the statement that the herd of twenty-three hundred in all consisted of two herds, one herd consisting of between eight and nine hundred head of three's and four's, and the balance were two year olds. I sold seven hundred of those to Mr. Farr, and claim to have had on hand about fourteen hundred for Oliver. That was the 9th of May. I claim that all the cattle I exhibited to Mr. Oliver on the 6th of April so far as I could

(Testimony of W. Beckford Kibbey.)

tell were included in the herd.

Q. How many of the cattle you claim to have submitted on the 6th of April, 1913, were included in the herd you submitted to Oliver on the 9th of May?

A. I cannot say just what proportion were two year old steers. In addition to that we gathered a herd consisting, to the best of my recollection, of about one thousand head of cattle, and of that one thousand head of cattle I should say on the mere estimate that there were about two hundred two year old steers. There were cattle and steers of various ages in this herd. It was on account or at request of Mr. Hall that we held six or seven hundred or even a thousand head of cattle [195] from the 6th of April until the 9th of May, 1913. We had those cattle on hand for sale. We had at that time over one hundred thousand acres of fenced land in Sonora, and it was customary for us to hold several thousand head from year to year. We had not gathered those cattle on the 6th of April for the purpose of making a tender of them to Hall under the contract. It is not true that the inspection of the cattle that was made on the 6th of April, 1913, was an inspection for the purpose of determining the grade and character of cattle which we would deliver at some future date under the contract. The original time when Mr. Oliver was shown these cattle was by Mr. Myers some time in January or February, and was a courtesy at this time for Mr. Hall to show his buyers what kind of cattle they were. It was not for the

(Testimony of W. Beckford Kibbey.)

purpose of compelling Hall to take up in train-load lots on the contract.

Q. So that there was no obligation, or do you claim there was any obligation on the part of Oliver or Hall at that time to accept any of the cattle gathered in April, 1913.

Mr. SEABURY.—We object to that, if your Honor please, as a question of law to be determined by the pleadings. We don't think it is proper cross-examination to ask the defendant what his position was.

The COURT.—Overruled.

Mr. SEABURY.—We except.

(Question read: So that there was no obligation, or do you claim there was any obligation on the part of Oliver or Hall at that time to accept any of the cattle gathered in April, 1913?)

A. In April or on April 6th?

(By Mr. STONEMAN.)

So far as my understanding of the matter is concerned, I understand that we were making no tender of cattle on April 6th.

Q. So that the only tender of cattle that you claim to have ever [196] made under this contract were cattle tendered by you on the 9th of May, is that true?

Mr. SEABURY.—The same objection.

The COURT.—Overruled.

Mr. SEABURY.—We except.

A. It is not. I, myself, know of a tender on the 13th of May. I was not present at this tender, but I know of it. There was a tender both on the 9th

(Testimony of W. Beckford Kibbey.)

and again on the 13th. I mean of the same cattle at both times, or practically the same.

(By Mr. STONEMAN.)

The cattle rounded up on the 6th of April formed part of the herd of May 9th. There had been a considerable cleaning up of that herd on May 9th. They comprised some of the same cattle that were offered for inspection of April 6th. There was no objection to those on April 6th. They were shown on the open range. I considered that those cattle were on May 9th cleaned up in the ordinary way in which cattle are usually tendered to a buyer.

Q. And yet out of the cattle which you say were tendered on May 9th, some other man—Farr—cut out one hundred and thirty-five because they were not satisfactory; is that true?

A. Yes, sir; out of about eight hundred head.

Mr. SEABURY.—We move to strike that because there is no evidence in this case as to what the contract was as to Mr. Farr. It might have been of an entirely different character from the privilege accorded to the plaintiff in this case to cut cattle. We move to strike it out as inadmissible.

Mr. STONEMAN.—If your Honor, please, this testimony is based upon the testimony of Mr. Kibbey.

The COURT.—Objection overruled.

Mr. SEABURY.—Except.

The COURT.—It was brought out by this witness the fact that Mr. [197] Farr did cut so many cattle out of that herd, and he stated that he did so after a tender to Mr. Oliver.

(Testimony of W. Beckford Kibbey.)

(By Mr. STONEMAN.)

I recollect perfectly this telegram of May 13th, addressed to Oliver at El Paso, Texas, designated in this suit as Defendant's Exhibit 8. My recollection is that that telegram was sent about eight o'clock on the evening, just about two hours after Mr. Oliver and Mr. Hall had left for Tucson, and that telegram was sent to the Santa Rital Hotel, because Mr. Oliver said that they were going to stay there. I sent it to Tucson. I was advised the following day that Mr. Oliver had not been there that night and I was asked in another wire from the hotel what they should do, and I instructed them to forward to El Paso.

The mail gets out of Nogales about six o'clock in the evening. I wrote this letter, designated as Plaintiff's Exhibit "K," on the 13th, but I gave it to Mr. Barry and did not forward it until the next day. I handed it to Mr. Barry and asked his opinion. When I sent the telegram I had not written the letter. I wrote the letter on the 13th, but I don't recollect that I sent it—mailed it on the 13th. It seems to me that there is an error. When I say I did write the letter, I wish to say I signed the letter. To the best of my recollection, I explained the situation to Mr. Barry and asked him to write the letter. I did not sign it on the 13th to the best of my recollection. I think the first time I saw that letter was on the 14th. I did not know the contents of this letter on the 13th. I would like to make an explanation. Will you hear me on that point?

Mr. STONEMAN.—If the Court will permit.

(Testimony of W. Beckford Kibbey.)

The COURT.—Make your explanation in answer to questions.

The WITNESS.—Through this entire testimony we have always looked upon that delivery as being May 13th, and for that reason we have been speaking about the time Mr. Hall left and to the fact [198] that he stayed over the following day, which would make it May 14; yet we have Mr. Hall's telegram dated May 14th from El Paso. I am positive the dates are wrong, that Mr. Hall arrived at Nogales on the 12th of May and left on the 13th, and not on the 14th as stated prior.

I received a telegram on the 14th of May from J. G. Hall, which is designated in this case as Plaintiff's Exhibit "L." I sent the telegram to Mr. Oliver before I received the telegram from Mr. Hall. I received that telegram from Mr. Hall several hours after I had put this letter in the mail, but possibly before it left Nogales. To the best of my recollection, I mailed that the afternoon of the 14th. To the best of my recollection, I sent the first telegram to Mr. Oliver at Tucson the night of the 13th, and I received the telegram from Mr. Hall the afternoon or evening of the 14th. I think Mr. Hall has testified that he was in Nogales the 13th and 14th.

I never answered the telegram under date of May 14th, designated as Plaintiff's Exhibit "L." Because I considered the matter closed, as previously stated in the letter written the day before. I considered that that letter, being mailed the same day I received the telegram, was sufficient answer in it-

(Testimony of W. Beckford Kibbey.)

self. I did not tell Mr. Barry to hold the letter.

Q. To all intents and purposes, you intended to convey to Mr. Hall the information which was contained in that letter of that date?

A. On the 13th or 14th—I am not positive which.

Q. You intended to convey that information on the same day that the letter was written?

A. On the same day that the letter was signed.

On the 9th of May, 1913, I asked Mr. Oliver to cut some cattle which were under herd there for delivery under the contract.

Q. What did you mean by asking him to cut the cattle—to cut out the undesirables or cut out 15 per cent of the merchantable [199] cattle?

A. It was up to him to do the cutting. I tendered a herd I considered according to the contract. They had been cleaned up. If he had not cut very many more than fifteen per cent we would not have made any objection. We would have made no objection if he cut a few more. Upon the theory that they were all contract cattle.

Mr. Oliver did not tell me that the cattle were satisfactory. He told that to Johnston. He did not say they were satisfactory. He told Johnston he thought the cattle would ship all right, and did bring out the fact that the cattle were all right. I heard him make that statement to Mr. Johnston. He did not make the statement to me. He may have said more. But he did try to get Johnston to accept them. He did not tell me. I am telling you what of Mr. Oliver's conversation I heard. He did not tell me

(Testimony of W. Beckford Kibbey.)

that he would try to get Mr. Johnston to accept. He and Johnston were together in the herd riding around. A half hour afterwards when Johnston was not there he came out with the flat-footed statement that the cattle were not up to the contract cattle. We then went back to Nogales, and had our further conversation which is in evidence.

If they are tame, it is the usual thing for a large number of cattle in a bunch to be lying down if they are in good marketable, merchantable condition. They always lie down. They would be naturally lazy and when not worried by people moving around. Yes, we were moving around to a certain extent not the first time. They were up against the fence in the shade of a lot of oak trees. We were walking our horses through the herd. We were not going fast. They were examining the cattle slowly. They were riding through the herd trying to size it up. About twenty per cent that were near the trees were lying down. It is my experience that when cattle have been driven for days, that is what happens. I suppose the cattle having been driven for days prior had something [200] to do with their lying down although the cattle had been there for three days. I suppose they wanted to lie down because they wanted to get off their feet. It is quite probable that they wanted to ease their feet a little. They would have to be driven nine or ten miles to Nogales. I said they had been driven three or four days previously. That does not mean they had been driven three or four days continuously. I do agree with

(Testimony of W. Beckford Kibbey.)

witnesses for the plaintiff that cattle with tender feet could not be shipped, but any cattle that lie down is not the test. If it walks without limping that indicates that his feet are not tender. If he won't get up when you ride around, you ought to make him—ride up to him.

Q. Did you testify that the same cattle were tendered again on the 13th that were tendered on the 9th.

A. I was not present on the 13th—but shall I testify as to my knowledge or as to what I know more or less to be the fact? I only know it from the report of my foreman.

I sold to Farr on the 9th.

It is stated in the pleadings filed by the counsel on behalf of the Alamo Cattle Company that in the early part of April, 1913, the Alamo Cattle Company tendered to plaintiff one thousand head of the contract cattle. It is an error in the pleading. There is a misunderstanding. A herd was shown to Mr. Oliver on the 6th of April, but it was not tendered to Mr. Oliver formally. About one thousand head was shown to him. There was no formal tender, and they were not represented to be contract cattle. We pointed out samples, but there was no formal tender. The first formal tender was in May; that is my contention. I personally never made any tender of any cattle after the 9th of May. The company did on the 13th. After this tender had been refused I sent my letter and wrote the telegram on the 13th.

Q. It was not refused until the 14th?

(Testimony of W. Beckford Kibbey.)

A. That is where I [201] am telling you that you are mixed. Just look at the telegram of Mr. Hall's of the 14th from El Paso. How could he have been disputing with us on the 14th when he was sending the telegram from El Paso that day.

Mr. STONEMAN.—That is all.

Mr. SEABURY.—Q. When you say, Mr. Kibbey, that you did not make any tender of cattle to the plaintiff on April 6, did you or did you not express a willingness at that time to allow Mr. Hall to take those cattle if he saw fit to do so?

Mr. STONEMAN.—We object to the question, if your Honor please, unless it is shown that those were full contract cattle at that time, because it would have no bearing on this case so far as being a tender is concerned, unless they were contract cattle.

The COURT.—I don't know that it is material.

Mr. SEABURY.—That was a condition, we claim, if your Honor please, that was put into the contract for the benefit of the seller and not the buyer. If the parties were together and saw fit, from a practical point of view, to waive the provision as to notice—if one said, "Take the cattle," and the other said, "I don't want to," or "I don't care to"—I think it is competent to prove what took place there.

The COURT.—I think an offer on the part of the plaintiff to allow him to take them at that time—

Mr. SEABURY.—Before your Honor passes upon that question, may I direct your Honor's attention to the contract again? We claim, if your Honor please, and will subsequently ask your Honor to so construe

(Testimony of W. Beckford Kibbey.)

the contract, that this provision that the buyer was to give fifteen days' notice for each delivery during the months of April and May, 1913, contemplated more than one delivery, contemplated, we think, about five train-load deliveries, and that the completion of this contract was not in any way dependent [202] upon a prior notice. In other words, the plaintiff could not defeat this contract by refusing to notify them when they wanted the cattle. We think that the defendant would have had a perfect right during April and May to say, "We intend to deliver you a train-load lot of cattle on such and such a date," so we think the provision for fifteen days' notice was beneficial to the defendant. They had a right to disregard it if they saw fit. So if the defendant did in fact offer to deliver a train-load of cattle in April, that is a legal tender on that occasion. If the response to the offer was, "We don't care to take them now if it does not make any difference to you," and the defendant assented, that is a different proposition, but it will still show that he made a tender on that date. It is material under the pleadings.

The COURT.—I sustain the objection.

Mr. SEABURY.—Exception.

Q. Did you make any offer to deliver the cattle exhibited to Mr. Hall on April 6 at that time to Mr. Hall under this contract?

A. I told him that we would like to have him take a train of two year old steers at once. He said the grass was too short, and he could not take them until

(Testimony of W. Beckford Kibbey.)

later. Mr. Oliver said that, not Mr. Hall.

Q. Mr. Kibbey, prior to May 13, 1913, did the defendant company have in its possession ready for delivery to Mr. Hall four or five thousand two year old steers such as are mentioned in the contract?

A. At what time?

Q. Prior to May 13, 1913.

A. It did not have the entire number in its possession. It had never less than two train-loads, I should say. It is difficult to say exactly how many it had at that time. I should say it never had less than two thousand head in its possession at any time. It had those in its possession on May 6th.

Q. Prior to May 13, 1913, had you already made arrangements to [203] buy and gather cattle aggregating four or five thousand head of two year-old steers and two thousand head of four year old steers?

A. We had already bought and contracted for more than enough cattle to fill this contract. We were ready to deliver those cattle that we so gathered under this contract prior to May 13, 1913. We continued to be ready to perform that part of our contract until Mr. Hall refused to cut the cattle.

Q. Now, Mr. Kibbey, I direct your attention to the last clause of the contract, Plaintiff's Exhibit "A," where the contract says, "cattle to be cut Marago to Distillidero, to give fifteen days' notice for each delivery in train-load lots during April and May," and ask you to give such explanation as you can of the provision for the delivery in train-load

(Testimony of W. Beckford Kibbey.)

lots during April and May, 1913.

A. I believe that, owing to the fact that it states train-loads there, and the train-load is usually supposed to be anywhere from six hundred to fifteen hundred head of cattle, and, as a matter of fact, consists of something like a thousand head often, and the fact that there were about five thousand head to deliver, that we were to be allowed to deliver them at reasonable intervals during those two months. I expected that we would be able to deliver about the first of April, and had cattle ready to deliver about the first of April.

Q. I asked you whether, according to your understanding of the contract, that portion provided that you should deliver all the cattle called for in the contract at one delivery?

A. It most certainly did not.

Recross-examination.

(By Mr. STONEMAN.)

We often hold under herd at our ranch, the ranch where I say we held cattle to be delivered, as high as seven thousand head; we did not have seven thousand head in April; we had about three [204] thousand—oh, in April, pardon me, I think we are in error. The ranch that Mr. Hall saw the cattle on was not the same ranch that Mr. Oliver saw the cattle on on the 6th of April. We very rarely have less than three thousand head on the ranch where the cattle were seen on April 6th, that is the one you refer to?

Q. Yes.

(Testimony of W. Beckford Kibbey.)

A. On May 9th on a different ranch we had three thousand head.

Q. Belonging to the Alamo Cattle Company, all bought and paid for?

A. I would not swear that all of them were paid for; the majority of them were. The contract sets out the Alamo Cattle Company brand. We are accustomed to put that brand on them before they are shipped. But we frequently ship cattle without re-branding them, providing the owners are present and make no objection.

Q. Were you trying to get any cattle from Magdalena in April 1913?

A. Our ranch is in the Magdalena district. We had trouble in getting cattle in that month and that year in the Magdalena district to a certain extent. Because of revolutionary conditions, to the best of my recollection. It was not pretty nearly impossible to get cattle in the district of Magdalena, but it took longer than usual. Prices did not go up, they went down. The Constitutionalist government put the prohibitive export duty on cattle about two weeks after or a month after the United States removed the duty, which was, I think, September following that time. In April and May, 1913, there was no Mexican duty; there was a United States import duty, however. The strict quarantine against Mexican cattle on account of ticks and fever was removed in February.

Q. If that quarantine was removed in February, why did you write the letter to Mr. Oliver that I

(Testimony of W. Beckford Kibbey.)

hand you, provided you did write the letter?

A. I did write this letter; I recognize my own signature. [205]

Q. That is your signature?

A. Yes, it is my signature.

Mr. STONEMAN.—We now offer in evidence and ask that it be marked as plaintiff's exhibit under proper designation, this letter which I have just handed to the witness. We ask that it be marked Plaintiff's Exhibit "P." (The letter is so marked.)

Mr. SEABURY.—There is not objection to the letter, if your Honor please.

Mr. STONEMAN.—This letter which is identified as Plaintiff's Exhibit "P," I will read all of it; the part I am reading it for is the last part of the letter. (Reads the following to the jury:)

Nogales, Arizona, April 18, 1913.

Mr. K. D. Oliver,

304 American Bank Building,

El Paso, Texas.

Dear Sir:—

Enclosed please find copy of Dr. Bray's letter of the 9th instant.

You are thoroughly aware of just what Dr. Bray said in connection with the movement of cattle from points south of Magdalena.

During my last meeting with him, I asked him what would be his attitude in connection with the movement of cattle from points south of Magdalena, but from known clean territory. He stated that he would prefer to have me offer the matter to Dr.

(Testimony of W. Beckford Kibbey.)

Melvin, who was present. I then got out a map of Sonora, and pointed out the location of the Espinosa cattle, which are located practically due west of Carbo, and asked Dr. Melvin in Dr. Bray's presence, if I could move these cattle to my ranch, and export them safely, provided they did not come in contact with the Zepeda cattle. Dr. Melvin's reply was that he believed we would be perfectly safe in bringing cattle from known clean territory. [206]

In this letter of the 9th, Dr. Bray practically repudiates his verbal permission, given us at the El Paso meeting, and leaves the whole matter to Dr. Melvin to decide. We are writing to Dr. Melvin today, asking him to decide the question of the new quarantine line, and on receiving his reply, will advise you regarding his decision.

The question between Dr. Bray and ourselves is a very delicate one, and we do not feel at liberty to state exactly what we think about the stand taken by him. In our reply to his letter, we have simply written him that we note contents of his letter, and are forwarding letter to Dr. Melvin, a copy of which we inclose in Dr. Bray's letter.

We wish you would have a talk with him, and sound him diplomatically regarding what he expects to do in connection with our cattle, as it is of vital interest to us to know as soon as possible what to expect.

If we are unable to get cattle from south of Mag-

(Testimony of W. Beckford Kibbey.)

dalena it will complicate an already difficult situation.

Yours very truly,

WEST COAST CATTLE IMPORTERS'
ASSOCIATION.

By W. BECKFORD KIBBEY, Jr.,

Secretary."

Redirect Examination.

(By Mr. SEABURY.)

The West Coast Cattle Importers' Association was an association formed by the various cattle dealers, of which Mr. Oliver was one, in an endeavor to handle the quarantine situation in a proper way, and to defend all our rights in case of any adverse rulings or anything of that kind. The name of K. D. Oliver, of El Paso, appears on this letter head under the hearing of "Executive Committee." When this letter was written Mr. Oliver was a member of the executive committee of the West Coast Cattle [207] Importers' Association. This letter was written by me as Secretary of the West Coast Cattle Importers' Association. It was written to Mr. Oliver not in regard to this contract, but between me and him, both as members of the West Coast Cattle Importers' Association. The difficulties I refer to in this letter of April 18th made it more difficult, but not impossible, to fulfill the contract sued upon. It did not make it impossible for me to have a sufficient number of cattle ready to fulfill the contract. It made it more difficult, but not impossible, it did not prevent us from being ready and able to make the delivery. As a matter

(Testimony of W. Beckford Kibbey.)

of fact, we exported considerably more than that amount.

Redirect Examination.

(By Mr. STONEMAN.)

Q. Nevertheless, it does furnish another reason in addition to that which you previously testified to as the only reason, why it was difficult to get cattle out of Magdalena.

A. We always had more or less quarantine troubles. I had forgotten there was anything more at that time. For five years it has been a fight with the United States authorities. It did furnish an additional reason why it was difficult to get cattle out of Magdalena.

Redirect Examination.

(By Mr. SEABURY.)

The quarantine referred to in my letter of April 18th was lifted after this letter was sent. It was lifted before May 13, 1913—to the best of my knowledge, it was lifted before that time.

[Testimony of Ramon Elias, for Defendant.]

Mr. RAMON ELIAS, being called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

Mr. SEABURY.—If your Honor please, I am just informed that Dr. Kibbey was not sworn. If that is so, of course, it is an over-sight on the part of everybody, and I suggest that he be now sworn [208] to the same force and effect as though he had been sworn in the first place. I presume coun-

(Testimony of Ramon Elias.)

sel for the plaintiff will consent.

Mr. STONEMAN.—That is the most cheerful consent I have yet given.

The COURT.—Let the record show that he is sworn.

(The witness is sworn by the clerk, and in addition an oath is administered by the Court to the effect that he swears that the testimony that he has already given is the truth, the whole truth and nothing but the truth, and that all statements made during the course of his entire examination are now confirmed under oath, as true as though he had been sworn previously to testifying.)

Direct Examination.

(By Mr. SEABURY.)

My name is Ramon Elias. I am in the cattle business. I have been with the Alamo Cattle Company for the last six or seven years, and have been in the cattle business for myself or my father ever since I can remember. I should say that would be about twenty years. During that time I have been engaged in the purchase and selling of cattle in and about northern Sonora, Mexico, and in the United States.

I have seen Terrazas cattle in the market in El Paso—that is in the stock year, and seen it in Kansas City and Fort Worth. I don't know exactly how many, but I have seen different herds in two or three different cities, about a train-load or two at a time. The last time I saw them was a year ago last February. I have seen Terrazas cattle almost

(Testimony of Ramon Elias.)

every year in he last three years—four years. In train-load lots—a thousand or more. I have seen those practically every year I have been engaged in the business, except this last year. I am familiar with the quality of the Terrazas cattle. [209]

Mr. Kibbey and I are the owners of the Alamo Cattle Company.

I recall the making of the contract, Plaintiff's Exhibit "A" in this case, a contract between the Alamo Cattle Company and Mr. Myers, dated January 16, 1913.

The first time that I met Mr. Hall—not Mr. Hall but Mr. Oliver, the representative of Mr. Hall—was on or about the tenth or fifteenth of February 1913, if I am not mistaken, here in Tucson. He asked me about the cattle that we had sold to Myers. He told me that he was contemplating buying these cattle and I thought it would be all right. I said I did not have any objection, provided Mr. Myers wanted to sell it. I don't recollect anything else being said. We may have talked about something else. The next time I saw him was—I don't remember the date, but he was going down with Mr. Myers to the Moraga ranch to see the cattle we had sold Myers. The Moraga ranch is about 56 miles south of Nogales and twelve miles northwest of Magdalena. The Distilladero ranch is about nine miles from Nogales in a direct line.

The second time or the third time that I saw Mr. Oliver I saw him here in Tucson at the Santa Rita hotel. That was on or about the first or the latter

(Testimony of Ramon Elias.)

part of March, and he started to question me about the cattle. I told him I considered the cattle in pretty fair shape, and he said if it was—after I had a little conversation—if it was immaterial to us, to start making deliveries in May instead of April, as the contract called for, and I told him that provided he would extend the time until June to enable us to make this delivery, I didn't see any objection. We talked the thing up with Myers, and it was agreed that we should start in May instead of April.

I think Mr. Myers was present on that occasion. If he was not, we mentioned the matter to him.

I saw Mr. Oliver next and talked with him with reference to this [210] contract when he came down to Nogales with Mr. Johnston and another gentleman to look at the cattle that Mr. Myers had sold him, about the fifth or sixth of April. I went with them to Magdalena and from there to the Marroga ranch.

Mr. Oliver requested me to gather some of the cattle, or the steers, that were sold under this contract, in order to show them to Mr. Johnston and this other gentleman, whom they were trying to sell the cattle to. I told them I would do the best I could for them. I went out myself and got the men to gather the cattle, as many as I could, for them to see. Approximately a thousand head or more were gathered. I sent out the men and the cattle were driven from the mountains and held at a certain spot so they could be looked at. At

(Testimony of Ramon Elias.)

that time there was Mr. Oliver, Mr. Johnson, a gentleman that came with Mr. Johnson—I don't recollect his name—that Mr. Johnson told me was one of his buyers, Mr. Kibbey and myself. On that occasion Mr. Johnson—of course I represented the Alamo Cattle Company in all the deals, pretty near, buying and selling, and Mr. Johnston inquired of me what class of cattle we were going to deliver. I pointed them out and I expected to get out what we thought was a fair sample of the cattle we were to deliver, and I pointed them out to him, and after seeing the first herd, I asked him if he wanted to see more. He said that was sufficient; we could see more as we drove back to the house. At the house he told me that he thought he could handle the cattle and that was the end of that day. I think this did not take place in the presence of Mr. Oliver, because, as I remember, Mr. Johnston and myself were driving in a separate buggy with one seat. I was in the buggy with Mr. Johnston, all the time we drove out and saw the cattle and came back. I asked Mr. Oliver when he was there if he wanted any cattle right away. I didn't know whether he had them sold or wanted [211] the cattle right away for Mr. Johnston. He said that he did not care to receive them until May. I told him if he cared to receive them right away, we were ready to give him a train-load at any time he wanted them.

This herd which I gathered on April 6th, in my opinion, was as good or better than Terrazas cattle.

(Testimony of Ramon Elias.)

There was a sufficient number in that herd to constitute a train-load. A train-load comprises fifteen cars or more, as many as the railroad will handle. Between six hundred and twenty or thirty head up to a thousand or fifteen hundred could be placed in a train-load. The cattle which I spoke to Mr. Oliver about on April 6th were two year olds, fully two year olds. There may have been one or two, or eight or ten, that were not two year olds. Of course, in a big herd like that it is impossible to—I thought that you inquired of me whether I had reference to the cattle that were tendered to Mr. Oliver on the 9th.

Q. All my questions relate, Mr. Elias, to the cattle you showed on the 6th of April, and I would like you to confine your answers to the 6th of April for the present. Now, I would like to know approximately how many in the herd you spoke of on the 6th of April.

A. That is a hard thing to say, because in that ranch we keep yearlings, two's and three's, and we pointed out to them the ages of cattle and class of cattle in the contract. There may have been four or five hundred head, or three hundred head—I don't know.

Q. What did you say Mr. Oliver said with reference to those cattle, as samples of the kind of cattle you would subsequently deliver?

A. Mr. Oliver talked the matter over with Mr. Johnston, and Mr. Johnston agreed to take the cattle.

(Testimony of Ramon Elias.)

The cattle that I showed Mr. Oliver on April 6th were left in the pasture until we had notice of the date they wanted them. That was about fifteen or sixteen days before the 9th. It was [212] around the 20th we started our round-up in that ranch, and moved all the cattle that were supposed to come under this contract to the Distilladero ranch.

Between the 6th of April and the 9th of May, the defendant sold none of the cattle which I showed to Mr. Oliver on the 6th of April. On the 9th of May we delivered some to Mr. Farr—the big steers. Before the 9th we made no delivery.

Q. Approximately how many cattle did you offer to deliver to Mr. Hall on the 9th of May, and whereabouts?

A. I am positive about thirteen hundred head of two year old steers, and close to eight hundred head of big steers, at the Distilladero ranch. I saw Mr. Oliver at the Distilladero ranch on May 9th. Mr. Oliver was there in company with Mr. Johnston. A shipper—I don't remember his name—was there too. I went with them and I was with them for a little while. I left them to give my orders to the men to move the cattle so they could see them.

Mr. Kibbey was present. Mr. Tankersley was there as Mr. Myers had agreed that his representative be there.

I had a talk with Mr. Oliver with reference to Mr. Myers or Mr. Tankersley before the delivery of the cattle under the contract, exhibit "A." It was

(Testimony of Ramon Elias.)

agreed between myself, Mr. Oliver and Mr. Myers that one of them should be there.

Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?

Mr. STONEMAN.—We object to that question, if your Honor please, for the reason that it does not appear that what Mr. Myers was going to do was binding upon this plaintiff; that Mr. Myers was acting in any capacity that would bind the plaintiff. For that reason it is incompetent and irrelevant.

Mr. SEABURY.—I direct your Honor's attention to Plaintiff's Exhibit "B," the contract between Mr. Myers and Mr. Hall, which [213] is as follows: "It is also mutually understood and agreed that the said E. W. Myers or E. M. Tankersley, his agent, shall be on the ground at the time of delivery of all cattle, and aid and assist in receiving said cattle."

Mr. STONEMAN.—That does not change the contract at all in any way. If it is relevant at all, it is a matter personally between ourselves and Myers and Tankersley.

Mr. SEABURY.—We think it relevant, if your Honor please, to show what Mr. Tankersley's position was. It shows that either one of them was to be there and aid and assist Mr. Hall or his assigns in receiving the cattle.

The COURT.—What did you ask?

Mr. SEABURY.—What, if anything, was said

(Testimony of Ramon Elias.)

about the function to be performed by Myers or Tankersley on receiving these cattle.

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

On the 9th of May when we arrived at the ranch where the cattle were being held,—the herd was held in two bunches, one consisting of big steers and another one consisting of two year olds—as soon as we came in there, Mr. Oliver asked me to let him have a couple of horses for him and Mr. Johnston to look over the herd, and I got the horses and turned them over, and went over about a quarter of a mile from where this herd was to see the big steers. When I came back from the big herd, they went over in one of the machines to where I was, and a gentleman by the name of Mr. Farr arrived in another machine that we had furnished, and Mr. Kibbey told me that Mr. Oliver did not care to take any of the big steers then. Mr. Oliver and Mr. Johnston were there. I asked Mr. Kibbey then if we could sell them to Mr. Farr, and he said yes, so I turned around and sold the big steers to Mr. Farr. Then I went with Mr. Oliver and Mr. Johnston to the herd of cattle where the small steers were. On the way back Mr. Johnston asked me how long a time [214] I would require to put up a thousand or twenty-five hundred head, because his buyer had to drive these cattle a good distance, and he did not care to make very many drives. I told Mr. Johnston that I did not care to put up more than a train-load at a time, and that was all for a while that was said between

(Testimony of Ramon Elias.)

him and me. After a while he came out and says, "I think these cattle are too thin to ship," and I asked him to go ahead and cut out what they didn't like. He just said that he thought he could not use them, and that was all.

That ended the conversation, so I says, "We will go back." Mr. Oliver told me, "Well, we will go into that"—that was when we went to get into the machines—"We will go to Nogales, and I wish you would hold these cattle for me three days until I can go to Tucson and find out whether the gentleman we are holding there will take the cattle or not. We will let you know further." I says, "All right." I held the cattle and Mr. Oliver did not show up until he came back with Mr. Hall. Two or three days after that, about the 12th—11th or 12th—I am not sure.

I heard Mr. Oliver say to Mr. Johnston that he thought these cattle would ship. I did not hear him say anything else. They were by themselves, riding around the herd, talking more to themselves than to us.

Q. Was the subject of the cattle you showed them on the 9th of May mentioned at any time?

Mr. STONEMAN.—We object to the question as leading and suggestive, and especially that the witness has already excluded references to any other conversations.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception.

Q. My recollection is that Mr. Oliver testified on

(Testimony of Ramon Elias.)

the stand that he told you on May 9th that the cattle that you offered him [215] at that time were not as good as or better than Terrazas cattle.

A. There was no statement made absolutely about Terrazas cattle on that day. I am sure of that. In my opinion, the cattle which we offered to Mr. Oliver, or Mr. Hall, on May 9th were in reality better than Terrazas cattle. There were about thirteen hundred head of such two year olds. And close to 800 head of the other herd that was first offered to them. I considered there was a good train-load lot of cattle as good as Terrazas cattle. I did not notice among the herd any substantial number of runts, because I cut them cattle myself at the Moraga Ranch before they were sent to Distilladero and I made it a point to cut out all to my estimation that were runts. There may have been somebody's else's opinion brought up—I don't know. I use the expression "cut" in the sense of separating the steers that were supposed to be unmerchantable stuff or runts. That is the expression we use in cleaning the herd, it is cutting the unmerchantable cattle.

I noticed no sway-backs nor blinds. There may have been eight or ten head that might have got a little sore-footed from the drive we had to give the cattle from the Moraga Ranch to Distilladero. They arrived at Distilladero about the 5th of May. They were there in pasture until Mr. Oliver and Mr. Johnston came out to get them.

I did not notice among our herd any cattle which

were otherwise unmerchantable. After May 9th I was at the ranch again—I believe it was the 12th—with Mr. Hall and Mr. Oliver and another man; I believe it is Gillespie. I don't know the exact name. Mr. Johnston wasn't with us on that occasion. Mr. Myers was with me and Mr. Tankersley was with me on that same day. They were both there on the same day. Mr. Kibbey was not with us on the 12th. I came to go there on the 12th to inspect or to deliver to Mr. Hall the two year olds which they had asked us to hold [216] on the 9th until Mr. Oliver should come back with the expected buyer and instead of that he came back with Mr. Hall. I met Mr. Hall and Mr. Oliver on that occasion at Nogales. We had a couple of machines, as I recollect, some went in one machine and some in the other. Nothing took place that I can remember on the road until we got there. We got the men to gather the herd and I asked Mr. Hall to go ahead and cut the herd of cattle to satisfy himself. Well, they went in there and looked around for a little while and then he came out and he says, he started to tell me there was too many unmerchantable cattle, that they weren't cattle according to contract. At that time Mr. Myers was present and I told Mr. Myers—

Mr. STONEMAN.—We object to any conversation between this witness and Mr. Myers as not binding upon this plaintiff.

Mr. SEABURY.—In the presence of the plaintiff, if your Honor please, with reference to this very matter?

(Testimony of Ramon Elias.)

The COURT.—Well, I don't think any statement made by Myers would be binding on the plaintiff.

Mr. SEABURY.—Notwithstanding that Mr. Myers is the assignor of the plaintiff, if your Honor please?

The COURT.—Yes, notwithstanding that fact. After he sold this contract to the plaintiff and the plaintiff had assumed all the burden and was to reap all the benefits. I do not think that any statement made by Mr. Myers would be binding upon the plaintiff nor do I think that any construction that Mr. Myers may have placed upon the contract would be binding upon the plaintiff.

Mr. SEABURY.—Nor any admissions made by Mr. Myers?

The COURT.—Nor any admissions made by Mr. Myers.

Mr. SEABURY.—The objection is sustained.

The COURT.—Yes, I sustain the objection.

Mr. SEABURY.—May I except? May I also except to your Honor's construction of the matter with reference to any admissions made [217] by Mr. Myers with reference to this matter, as not being binding upon plaintiff?

The COURT.—Yes.

Mr. SEABURY.—May I ask whether this contract between Myers and Hall is in evidence—it is, is it not? Plaintiff's Exhibit "B."

Mr. STONEMAN.—Yes.

The COURT.—When I say that any admission made by Mr. Myers should not be received, I mean

(Testimony of Ramon Elias.)

any admission made by him after the assignment by him to Mr. Hall of the contract in question, not admissions made theretofore.

Mr. SEABURY.—May I still reserve my exception to your Honor's ruling as modified?

The COURT.—Yes.

Mr. SEABURY.—I do not wish to burden your Honor with it, but I wish to direct your Honor's attention to the part of the contract which makes Mr. Myers or Mr. Tankersley agent of Hall, for the very purpose of being there at that time.

The COURT.—The plaintiff has not objected to his being there. What they object to is the admissions or statements alleged to have been made by Mr. Myers.

Mr. STONEMAN.—If the Court please—

The COURT.—There is nothing before the court. I have ruled on the objection.

Mr. STONEMAN.—I don't like counsel's construction of the contract. It does not say what he says it does.

The COURT.—You gentlemen can argue that at another time.

Q. Mr. Elias, please tell us what, if anything, you said to Mr. Myers in the presence of Mr. Oliver or Mr. Hall on May 9th.

Mr. SEABURY.—I don't know whether that will be objected to or not. I want to give counsel ample opportunity to object if [218] they want to make an objection.

A. I must say that as Mr. Myers was the man or

(Testimony of Ramon Elias.)

conveyance to bring me Mr. Hall's statement that the cattle was not as good as the contract. I told Mr. Myers to get him and tell me which were not as good. Show me the cattle which were not according to contract, which he refused to do and says, "If he doesn't cut those cattle, I don't consider that he has any right or can say that he hasn't enough cattle for a train-load of cattle." Mr. Oliver was right close by on horseback. Mr. Oliver didn't say much. He was standing talking to Mr. Hall. Mr. Oliver never made any objections at all. Mr. Hall was the man making objection. After we got together, the same thing was repeated to me by Mr. Hall and I told them it was impossible that I considered no one could comment on any herd of cattle unless they had cut them to know positive whether there was a train-load of cattle or not, so we could argue the point on any steer he thought might be a bad steer and I thought might be a good one. I was present when Mr. Myers and Mr. Hall made a bet in regard to whether or not the cattle were two years old or not. There was a question asked by Mr. Myers to Mr. Hall when Mr. Hall was claiming there was a whole lot of yearlings there, so he asked him which is yearlings and he said "that one" and Mr. Myers says, "I bet five dollars that's a two year old." Mr. Hall accepted and we threw the steer down and looked at it and Mr. Hall lost the bet and Mr. Myers asked him if he wanted to point out any more, to make any more bets, and Mr. Hall said "No."

After that we got together again and Mr. Hall

(Testimony of Ramon Elias.)

started to tell me the same thing over and over that the cattle were not as good as the contract called for and I insisted that he cut out what he didn't think was according to contract, so we could dispute them, and he wouldn't do it, and then I asked him to show me what [219] cattle he expected to get, whereby he went out and cut out about twenty-five head of the white face, red and best colored steers to one side and he said, "That's the cattle I want," and I said to Mr. Hall, "There's no use to lose any more time. That's not the cattle I offered and we'll just let it go until we see Mr. Kibbey."

Mr. Hall just cut out about twenty-five or thirty head of the best produce steers there and he says to me, "That's the kind I want. Do you want to deliver me a train-load like that?" I said, "That's not the kind of cattle I offered in this contract and I don't blame you for wanting that kind of cattle."

He never made any attempt to cut out any runts or stags. We ended the argument right there and come back to Nogales. When I got back to Nogales I talked the matter over with Mr. Kibbey.

Recess until Thursday morning, 10:00 o'clock. Jury duly admonished as before and excused.

Thursday, May 28, 1914.

At 10:00 A. M. this day, both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court, and thereupon the following further proceedings were had herein, to wit:

(Testimony of Ramon Elias.)

(By Mr. SEABURY.)

I was starting to state that I took the matter up with my partner, Mr. Kibbey, and we talked the matter over between ourselves, and then I went home. After awhile I returned and met Mr. Oliver on the street right by the Montezuma, and Mr. Oliver asked me if there was no way we could fix this matter up. I said, "It is up to you to see what you want done in regard to the matter." This is in the evening of the 12th.

(By the COURT.)

Q. Was there any conversation after the 9th between you?

A. Not after the 9th, because Mr. Oliver told us on the 9th [220] that he would go to Tucson and come back and decide this matter. This conversation was on the 12th, in the afternoon after we returned. He asked me if there was no way to avoid trouble and I said: "It is up to you to state what you want done." Then he asked me if we would be satisfied if some good cow man would decide in regard to these cattle. I told him to name his man, and if I knew him, I would be very glad to take the matter up with him. Then he mentioned Mr. Bens Need's name. I said if Mr. Need would cut the cattle and decide whether they were as good as Terrazas cattle, I would be satisfied, and then he said: "I will let you know about it." After that I went home and Mr. Oliver and Mr. Hall and Mr. Kibbey had some conversation in the room.

(Testimony of Ramon Elias.)

(By Mr. SEABURY.)

I only heard part of that conversation when I came back. Mr. Oliver, Mr. Hall and Mr. Kibbey were present. I arrived there about the end of the conversation when Mr. Kibbey had told Mr. Hall that the best we would do would be to return one-half of the money in order to avoid any complications. I don't recollect anything more. I left. I had other business with other gentlemen, and I think I went out.

Q. Now, Mr. Hall testified the other day in substance as follows: "What was said between you and Mr. Elias at that time with reference to the grade of cattle?" Answer: "Well, when I first got to the herd, I asked him what he was doing with so many yearlings in the herd." Was anything said by him about the yearlings in the herd?

A. Right after Mr. Hall arrived there most of the conversation was had with Mr. Myers—not with me. He never mentioned anything to me about the yearlings.

Q. Then he goes on to say: "He said that they were sold to another party, and that whatever I cut out there that I didn't [221] want he was going to turn over to this other man and I called his attention to the fact that the herd was nearly half yearlings and that if I did go to work to trim on the cattle—I asked him why he didn't have his cattle that he was tendering me on the contract trimmed out where I could look at them." Do you recall any such statement as that?

A. I do not recall that Mr. Hall ever said anything

(Testimony of Ramon Elias.)

regarding that to me, but most he said to Myers, and Myers talked to me. I was up under a tree and they were in the herd. I was out of the herd altogether.

Q. Now, he said, page 18 of the testimony—it was asked, “What, if anything, did Mr. Elias say with reference to the cattle which at that time you testified you pointed out to him as not being as good as or better than Terrazas cattle?” Answer: “He said he had never seen the Terrazas cattle and wasn’t in a position to know.” Did you ever tell Mr. Hall that you had never seen Terrazas cattle?

A. I did not say that, because I guaranteed cattle as good as or better than Terrazas cattle.

Q. I asked you whether you did or did not make that statement. A. I did not.

Q. Now, Mr. Hall also said in response to this question, as follows: “Was there any further conversation between you and Mr. Elias with reference to these cattle at that time and place?” Answer: “Yes, sir.” Question: “State the further conversation.” Answer: “After I had cut out these thirty-five or forty head, Ramon came in and told me it was no use going any further that he couldn’t get a train-load of cattle out of there of that kind I was cutting.” I said, “I know that,” and I says, “What do you want to do about it?” “Well,” he says, “I don’t know what to do.” He says: “I can’t give you an answer until we go back to town and see Mr. Kibbey,”—What part of that conversation, if any, is a correct statement of [222] what took place at that time?

A. I think he has it turned the other way. I asked

(Testimony of Ramon Elias.)

what kind of cattle he expected to get, and showed samples of the kind he expected under the contract and he started to cut out, as I mentioned before, a number, and when he got about twenty-five or thirty I said that if that was the kind of cattle he wanted, and he said: "Yes," and I said, "I don't blame you, and I don't think we are obliged to deliver that kind. So there is no use to go any further."

Q. Mr. Hall also testified, Mr. Elias, that the herd was not put in shape that it should be in under the contract. He said in part that it consisted of fully forty per cent yearling steers, which he called Mr. Elias' attention to, and "he said very well; we are going to ship to someone else," and I said, "I am not going to trim your herd for you." Do you remember any such conversation?

A. No, sir; we never expected him to trim that herd for us. I trimmed the herd as I thought it ought to be under the contract. When this herd of May 12th and 13th was trimmed at first at Morego and Alamo ranches, as I always see to this work I went down and cut the cripples and blinds and all the sway-backs, and everything that I thought was unmerchantable. It was useless for me to ship any such stuff from the ranch because they had to travel two or three days, and it was useless to have any cripples in the herd because I knew they would be left in the road. We seldom have any cripples, as we buy most of our stuff, as I receive the best cattle I can get. I trimmed most of the yearlings. I left them at Distilladero. We had them sold to another

(Testimony of Ramon Elias.)

man. I may have left a few in the big herd of two thousand head. It is practically impossible for one man to go and cut out every one that is a yearling. I trimmed the herd I offered on May 9th. That was done the day Mr. Oliver was there, when we cut the big steers back. Then I cut the yearlings because we have this pasture at Distilladero and we [223] always hold a certain amount of cattle there, and I turned them loose in the big pasture. It took three days and a half to bring the cattle up to the ranch where they were exhibited on May 9th. They arrived about the 5th and they were exhibited on the 9th. In my opinion, that trip between the two ranches with five days apart, from the date of arrival and the date of starting from the ranch further south did not render the cattle unmerchantable on the 9th. We were in a position to deliver in May one thousand four year old cattle under this contract. I counted the number of cattle that were tendered on May 9th. There was, when we separated the big steers, approximately about eight hundred and thirty or forty big steers in the herd. I first counted the total, and then, when I separated the big steers, I counted eight hundred and thirty or forty head, and then counted the rest of the cattle and there was between fourteen and fifteen hundred head; and that is when I cut the younger stuff and threw them in the pasture. I did not count the ones I cut out, but it left between thirteen and fourteen hundred head in the herd. I was present at the time of the talk with Mr. Farr. Mr. Oliver was present when Mr.

(Testimony of Ramon Elias.)

Farr was cutting the cattle. I was present because I was making arrangements with Mr. Farr to take the cattle. I was making the arrangements in the presence of Mr. Oliver. I had made them and Mr. Johnston and Mr. Oliver were there.

Q. What did you say to Mr. Oliver with reference to the transactions?

A. I did not say much of anything of the contract, but I asked Mr. Johnston and Mr. Oliver how they liked that herd of steers and they said they looked all right. That was the cattle turned over to Mr. Farr. They were offered by Mr. Kibbey to Mr. Oliver before tendered to Farr.

Q. What else took place that you know of with reference to this matter, Mr. Elias, after May 13th and 12th? [224]

Mr. STONEMAN.—We object to anything that took place after May 13th, that being the date when the Alamo Cattle Company rescinded this contract and on their part terminated it.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

The freight rate was per head from Nogales to Denver in May, 1913, or thereabouts, approximately one hundred and forty dollars a car. Figuring feed and expenses, that would figure out almost four dollars a head. The cattle which I tendered to the plaintiff on May 9th I know were in shipping condition at that time. I base my answer on my experience for a good many years in shipping cattle and I have never pretended to deliver any herd not

(Testimony of Ramon Elias.)

in a shipping condition. In my experience I have handled a good many thousand head of cattle. That herd was in as good a shipping condition—part went as far as Canada, and as far as Denver, Colorado, after they were refused. I mean this same herd of May 9th and 13th. Close to five hundred head went to Canada. Approximately four hundred and sixty or seventy head went to Denver. The Canadian shipment was made to J. B. Jett and Company. The Denver shipment was sold to Donohue, and two herds sold to Tankersley, and one to a gentleman I don't recollect. These practically cleaned out the herd shown the plaintiff on the 9th and 13th of May.

I have sold Mr. Tankersley quite a number of cattle recently.

Q. I did not mean that. You know where Mr. Tankersley is now?

A. He started a train-load of cattle somewheres in Colorado.

Mr. STONEMAN.—We object to it as not responsive.

The COURT.—Strike the answer out as not responsive.

Mr. STONEMAN.—And we object to the question as irrelevant, incompetent and immaterial.

Mr. SEABURY.—The purpose, if your Honor please, is to explain the absence of Mr. Tankersley. It appears that Mr. Tankersley [225] is a material witness. We would be glad to have him here, but he is unfortunately in Colorado and not obtainable to us.

The COURT.—The objection has been withdrawn.

(Testimony of Ramon Elias.)

Mr. STONEMAN.—Yes.

(By Mr. SEABURY.)

Mr. Tankersley, I think, is close to Denver. I am not sure exactly where he is. We had a telegram, but I don't know where he is. He is out of Arizona. I understand that he left here on the 20th, early in the morning, and shipped some cattle from New Mexico. We have requested him to return here and he answered that he would like to be here if possible, but he was unable to sell his cattle and could not arrive in time.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. STONEMAN.)

I tendered to Oliver on the 9th of May between thirteen and fourteen hundred head. I tendered on the 12th and 13th of May approximately the same number. I did not count them the second time. I was familiar with the cattle which were exhibited for inspection on the 6th of April.

Q. Mr. Kibbey has testified to the effect that the bunch of cattle that were tendered on the 9th of May were practically the same cattle as were gathered for inspection on the 6th of April, is that true?

A. That is the steers that were in the bunch. Of course, there were a good many cows and other cattle in the same herd that we showed as a sample.

All that could be gathered of the two's, three's and four's were included in the herd tendered on the 12th of May. I say, all that could be gathered, because on a ranch of fifty thousand acres you cannot gather

(Testimony of Ramon Elias.)

all the cattle you turn loose unless you run over five or six times. The cattle that I tendered on the 13th were practically the same cattle that were tendered on the 9th of May. [226] The biggest majority of the cattle that were tendered on the 9th of May was made up largely of the cattle that were exhibited for inspection on the 6th of April.

Q. Did you not request Mr. Oliver on the 9th of May, or did you not ask Mr. Oliver on the 9th of May, if he would not insist on delivery of the four year olds, that you would rather not deliver them, as you had the four year olds sold to some one else?

A. I did not. I did not say anything to Oliver myself, but I told Mr. Kibby to tender him the steers we had there on that date, and if he did not want them, to ask his permission for them to be sold to Mr. Farr. As a matter of fact, these steers were not sold to Mr. Farr at the time of the tender on the 9th of May. There was one hundred and fifty missing on the contract we had with Mr. Farr, and to make up this contract he was coming after that number. And he asked me if I could not deliver any more than the one hundred and fifty, and I told him, provided Mr. Oliver did not take the cattle we had there, he could have them. I did not say to Mr. Oliver that these four year olds were under contract, and it would be more convenient for us to deliver them later. I am positive about that. I did not have a word with Mr. Hall on the 9th. I never mentioned a word to Mr. Hall on the 12th. The second tender was made on the 12th, I think. My testimony refers

(Testimony of Ramon Elias.)

to the 13th—our conversation, not the tender of the cattle. The tender was made on the 12th. The cattle which I tendered on 12th in the amount of thirteen or fourteen hundred head were the only cattle that I tendered that day. I am practically sure it was not less than thirteen hundred or more than fourteen hundred head.

Q. I direct your attention to Plaintiff's Exhibit "K," being a letter addressed by the Alamo Cattle Company and signed by W. Beckford Kibbey, Jr., dated at Nogales, May 13th, and addressed to J. G. Hall, at El Paso, Texas, in which you make this statement: [227] (Reads:) "We beg to advise you that, owing to the fact that a herd of two year old steers was tendered to you on May 12th, consisting of 1,093 steers, from which we asked you to cut a train-load, but which cutting was refused after having come expressly for that purpose, after due notice, we consider that you have forfeited all interest in the contract and so advise you." How do you explain the discrepancy in the statement of the number of the herd and your testimony?

Mr. SEABURY.—We object to that, if your Honor please, upon the ground that the letter is signed by Mr. Kibbey and not Mr. Elias. The question is the discrepancy in his statement as to that.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

(By Mr. STONEMAN.)

I am testifying as an officer of the Alamo Cattle Company. I counted the cattle to be delivered on

(Testimony of Ramon Elias.)

the 9th, and I found that number in there. At Mr. Oliver's request I put about twenty men to watch those cattle. This amount we had left there—about thirteen or fourteen hundred head, and during the three days that they were out it is not impossible that some of those cattle might have gotten away, and when we left on the 12th for Nogales, I believe Mr. Kibbey had the herd counted over again, and it is possible that some cattle got away while they were watching the pasture.

All the cattle tendered on the 12th were contract cattle. That is my idea. I swore that is what I believe. I say, to my experience and my idea, they all were. I base that statement upon my long experience and the fact that I carefully cleaned up that herd myself. I don't recollect Mr. Kibbey's testimony yesterday in which he stated that twenty-five per cent were cut out of that bunch. I heard him say that twenty per cent were [228] lying down and would not get up when they were riding through the herd. That happens very often with our cattle. We generally cut them afoot, and don't use any horses. We had 2,300 head when we drove them cattle to that ranch, and we use a great many men. Those are generally needed on account of the amount of brush on the road. I testified that I had twenty men herding these cattle at the Distilladero ranch when they were tendered. We had the same number of men working for us until we got there with the cattle. The cattle were rounded up in a bunch while

(Testimony of Ramon Elias.)

they were being tendered under guard of twenty-five men probably.

Only Mr. Hall and Mr. Oliver were riding through that herd for the purpose of inspecting. Mr. Myers was afoot. Nobody was in the herd at the time when Mr. Hall and Mr. Oliver were there. The cattle that we sold Mr. Farr were the same cattle that we showed Mr. Oliver and Mr. Johnston. I don't know whether some of those cattle were the same cattle shown to Mr. Oliver when he went down there to look at the cattle before he bought the contract from Mr. Myers. I didn't show the cattle to Mr. Oliver. Mr. Myers did. The cattle were in two pastures. I testified that I superintended the gathering of them, buying and selling of them. That is a different thing from showing them to Mr. Oliver. I suppose the same cattle were offered for sale to Mr. Oliver that were in the Moraga pasture.

I made the contract with Mr. Farr for the sale of these four year olds, some time in January—I don't recollect. The cattle were to be delivered to Mr. Farr under that contract, in the month of March—most of them. I delivered some in the month of May, because there was 150 head there, as I say, of the other contract, and he was to take them whenever we could get them. Those cattle delivered to Mr. Farr were better than the Terrazas cattle. Some white faces, and red, and all good color.

I believe that the bunch of cattle tendered on the 12th were [229] all—pretty nearly all—two year olds. I don't claim that all were two year olds.

(Testimony of Ramon Elias.)

Q. Do you agree with Mr. Seabury that the only infallible test is to look at the teeth to see whether or not they are full two year olds?

A. It may be a man that has not been raised—has not had the experience in raising that kind of cattle; I can tell before looking at the teeth.

Q. Any good cattleman with the same experience that you have can tell the same thing, can't he?

A. It all depends upon whether he has been familiar with the cattle or not. I can pretty near claim that he is not a two year old without looking at the teeth. I would not deny that any other cattleman of equal experience could do the same.

I knew that under the contract I had to deliver full two year olds.

Q. And you took no other precaution for the purpose of determining whether all the cattle were full two year olds other than you testified to, did you?

A. I took the precaution to ask Mr. Hall to show me whether they were or not, and he wouldn't do it. He showed me one, and it was a two year old, and he wouldn't show me any more. I proved it was a two year old, by throwing him down and he had two big teeth.

Q. Didn't he point out six or seven of the others to Mr. Myers?

A. I don't know that he pointed out any to Mr. Myers. He should have pointed them out to me, not to Mr. Myers. This animal that I threw down was taken out of that herd.

Q. Do you mean to say that because that animal

(Testimony of Ramon Elias.)

was a full two year old, it must follow that your judgment was right, and that all the rest of them—

A. The argument was not with me; it was with Mr. Myers.

Q. Anyhow, you being under contract, the burden being upon the Alamo Cattle Company to deliver two year olds, before you could [230] ask Mr. Hall to accept, you had to tender full contract cattle?

Mr. SEABURY.—We object to the question on the grounds that it purports to state a question of law to the witness, and is otherwise incompetent and not proper cross-examination.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Mr. STONEMAN.—I didn't specially cut out one by one and look at all those cattle, each individual head of cattle in the herd, on the 12th of May. I rode through that bunch of cattle for the purpose of examining them for ages. I was in the herd several times. Since about the 20th and 23d of April—several times after the 20th of April. I did not hold that herd together all the time. While they were gathering that herd, I was always looking at the cattle gathered. Gathered them and held them in the gathering pasture—every time we inspected them and threw them into that pasture.

I don't know how many were thrown into that pasture between the 22d of April and the 9th of May. I had 2,300 head, with the big steers.

Q. Each one of those was a full two year old?

(Testimony of Ramon Elias.)

A. I am not supposed to clean up a herd for somebody else.

Q. What do you mean by cleaning up a herd?

A. I am not supposed to deliver the other man just a two year old. It is up to him whether it is a two year old or not.

Q. Then, why don't you answer my question? I say, you are prepared to say they were all two year olds? A. I think they were.

I did not testify that I asked Mr. Oliver to cut some of the cattle. On the 9th of May, 1913, the cattle were there at the disposal of Mr. Oliver; he could have cut them or got another person to cut them. I mean by cutting, separating [231] the regular cattle or anything that he thought was not merchantable or might not ship. If the buyer thinks there are any unmerchantable cattle in the herd, it is his duty to show the seller where he is wrong or right.

Q. Did you consider it was your duty under the contract to deliver full contract cattle before the purchaser should exercise his opinion to cut back fifteen per cent?

A. I considered it was my duty to deliver cattle according to the contract.

I sold the Farr cattle on or about January—I don't recollect the date. I don't remember testifying yesterday that I did not sell Mr. Farr any cattle before the 9th of May, 1913. I think I was mistaken if I testified that I never sold any cattle before the 9th. I still insist that during all of the time that I

(Testimony of Ramon Elias.)

was down there, I heard absolutely no statement made concerning Terrazas cattle.

Q. Because no demand was made upon you that the cattle should be as good or better than Terrazas cattle, that would relieve you of the duty of tendering them, would it?

A. I consider they made no demand at all when they would not show me where I was wrong. Mr. Oliver may have showed me some, but he never showed that there was no train-load of cattle there that were not according to contract. I think that it was Mr. Hall's duty to prove to me that I didn't have a train-load of cattle according to contract.

I never delivered to Frank Clark any cattle which I had already tendered to Mr. Hall. I delivered yearlings to Mr. Clark. Yearlings not of the same bunch that were exhibited to Mr. Hall. They were not there in the Moraga pasture. They were shipped out of Magdalena and never driven there at all. At the Distilladero ranch on the 12th of May, 1913. Mr. Hall didn't say to me, "Why have you got so many yearlings in this bunch?" and I did not, in reply to that question, say that [232] "those yearlings are sold to somebody else." There might have been some yearlings in that bunch; I don't claim to say that every one was a full year old—or a full two year old—he had a right to cut them if they were. I don't consider an animal two years old a stag. There might be some stag steers, but I consider a stag a full four year old animal. There may

(Testimony of Ramon Elias.)

have been some stags in the bunch but I don't consider them stags.

There may have been a few that were pretty thin.

Q. If a stag is not a stag at two years old, how does he get to be a stag at four years old? They are trimmed at different ages.

These steers were most of them born along in February, March and April. After April up to about the 20th or 25th of May quite a lot are born.

Q. That being the case, doesn't a contract which compelled you to deliver full two year olds in April and May make a rather difficult contract to fulfill?

A. Well, I considered the same difficult for the man that is receiving, and for either one to show each other which is wrong.

Q. Nevertheless, it makes a difficult contract for you to fill, doesn't it?

A. Not necessarily, because we have always had enough cattle to deliver our contract, or more than enough. I tender to a purchaser what I think is right, to my own belief, and if I am satisfied with a customer, I lots of times let him cut out more than I am obliged to. I let him cut out more than fifteen per cent, lots of times. Even though I am satisfied that all the animals tendered are full contract cattle.

Q. Provided that the cut of fifteen per cent does not produce a bunch below a train-load?

A. The man that is buying the stuff may want less than I have.

I consider a train-load fifteen cars. I don't think I testified that I considered a train-load of cattle of

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(Testimony of Ramon Elias.)

Terrazas cattle a thousand head. [233]

Q. If you did, you would be again mistaken?

A. I think so.

Redirect Examination.

(By Mr. SEABURY.)

In my opinion all the way from 650 two year old steers to as many car-loads as they want to load after that constitute a train-load of cattle. 650 might be about fifteen cars. Fifteen cars is the least that the railroad will give you special service for. Most of the cars we load at Nogales, or wherever we load, are thirty-six foot cars. Special orders will bring forty foot cars.

Q. Mr. Elias, in your opinion, can you say whether or not a person who is familiar with American cattle could judge of the age of cattle to the extent of being able to say whether a steer is a two year old or not of Sonora, Mexican cattle?

Mr. STONEMAN.—We object, for the reason that it is not shown that the witness is qualified to testify as to American cattle, his testimony being confined to Mexican cattle.

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

Q. Are you familiar with American cattle, Mr. Elias? A. I am.

Q. Now, Mr. Elias, Mr. Johnston testified yesterday, as I recall it, that he was familiar with the cattle and he could tell whether Sonora cattle were two years old or not. I ask you whether there is any substantial difference between two year old Sonora

(Testimony of Ramon Elias.)

cattle and two year old American cattle.

Mr. STONEMAN.—We object, for the reason that the witness is not properly qualified to testify as to two year old American cattle.

The COURT.—Two year old what?

Mr. STONEMAN.—American cattle.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception.

I have raised two year old American steers myself. My father had [234] them ever since I can remember. I am familiar with two year old American cattle. There is quite a substantial difference between Sonora two year old and American two year old cattle. The biggest difference is the size of the animal. The American cattle, good cattle are always bigger, taller, heavier. At the same age they are a good deal bigger than Mexican cattle. From my experience with both Mexican and American cattle, I am able to say whether the ages of the Mexican cattle can be judged and determined by the same standard as American. It can never be determined by the size. The principal method of determination is by the horns, by the tail, or by the—so many natural things that to a man has been raised by the general appearance.

Recross-examination.

(By Mr. STONEMAN.)

Terrazas cattle are larger than some Mexican cattle because they have been bred up to American bulls. But they are not larger than our cattle. Our cattle have been bred up to American bulls too.

(Testimony of Ramon Elias.)

Q. Yesterday, did you not say in response to these questions: "I mean, during your experience as a cattleman, how frequently and in what numbers approximately have you seen Terrazas cattle?"

A. "Well, I saw it almost every year in the last three years—four years." Q. "In what quantities have you seen them each year, Mr. Elias?"

A. "Train-load lots." Q. "Does that mean a thousand or more?" A. "A thousand or more." Did you not testify that, in your opinion, a train-load lot was a thousand or more?

A. I testified that that was the amounts I had seen.

Q. Did you not define a train-load lot to be, in your opinion, a thousand or more?

A. I did not; no, sir. [235]

[Testimony of Thomas J. Donohue, for Defendant.]

Mr. THOMAS J. DONOHUE, being called as a witness on behalf of the defendant, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is Thomas J. Donohue. I live at Omaha, Nebraska. I am in the cattle business. I have been in it all my life. I am thirty-seven. I have been engaged in the cattle business in South Dakota, Wyoming, Nebraska and I have cattle interests also in Sonora, Mexico, close to the line at Nogales. I know the brand of cattle known as Terrazas cattle. I have seen the Terrazas cattle for about the last ten

(Testimony of Thomas J. Donohue.)

years, and have handled a great many of them. I have seen them on the Terrazas ranch, and also seen them on the market after they were matured, in the north. I have seen them every spring on the ranch for the last six or seven years. I have ridden through the ranch and seen them on the range, and seen them in the El Paso yards and the Denver yards.

Q. What is your idea of what is understood by a train-load at Nogales and thereabouts?

A. I would call a train-load at Nogales or thereabouts of two year old Mexican steers of a grade as good as or better than Terrazas cattle from 500 to a thousand head, and have shipped as many as two thousand. I think the minimum is 500.

I know Mr. Kibbey and Mr. Elias.

I was in Sonora in May, 1913; I bought a herd of cattle from the Alamo Cattle Company about the middle of May, 1913. I bought 940 head of them. I know what cattle I bought. I bought 940 head of Mexican steers, two and three year olds. I think it was on May 20th. I examined these cattle before I bought them. I saw this herd of cattle about May 8th or 9th. They were at that time on the Distilladero Ranch, about nine or ten miles from [236] Nogales. They were not offered to me for sale at that time. I went out there and cut these cattle on the 20th. I had bought them at this time from Mr. Kibbey and I went out there to cut the cattle on this particular day and I cut them. I received 940 head.

In my opinion as an expert in Terrazas cattle and other cattle, the cattle which were delivered to me on

(Testimony of Thomas J. Donohue.)

or about the 20th of May by defendant were fully as good and probably better bred cattle than Terrazas cattle. If those cattle had not been in a merchantable condition at that time I wouldn't have received them. I shipped those cattle the second day after I purchased them. I made shipment about the 22d. I shipped 440 head of these cattle with another train of my own cattle and I sold 501—500 head to a gentleman from Canada. They were loaded for Canada on the 21st day of May. I couldn't tell you, sir, when they arrived in Canada, it would be about two weeks later. The balance of the shipment went to Range Junction, Wyoming and Edgemont, South Dakota. I don't know exactly how many of these particular cattle died in shipment because the shipment to South Dakota and Wyoming included not only part of the cattle I got from defendant, but another portion of cattle, and I don't know what actually died out of these two shipments. But I do know the total result. I lost 7 head out of a train-load of cattle, out of about 1500.

I saw the cattle at the ranch of the defendant on the 9th and 13th of May. I am familiar with the brand of those cattle. I know them by the general appearance of the herd of cattle. I saw some of the cattle, which were on the ranch of the defendant on the 9th and 13th days of May, subsequently in Denver. I think I saw them all. I saw all my cattle there. I shipped them to Denver. I first shipped to Denver, from Nogales. I didn't ship these cattle to Canada myself; I sold them in Nogales stock-

(Testimony of Thomas J. Donohue.)

yards. The cattle I sold in Nogales stockyards went to Denver. I didn't [237] see any of the ones I sold there. I just saw the ones I owned myself, 440 head. I took those myself to Denver. I had them at the Denver Union stockyards. I showed a few of those cattle to Mr. Johnston, the representative of Clay, Robinson & Co. I know Mr. Johnston. As I remember it Mr. Johnston looked me up there in the yards and asked me if I bought some of those cattle from the Alamo, and I told him I had. I believe I was talking with Mr. Stevens first, had some conversation with Mr. Stevens. Later Mr. Johnston looked me up and asked me if I had any of the cattle there with me and I said I had and took him down to the pens and showed him some of these cattle with the Alamo brand on. The way I remember it, Mr. Johnston said that if they looked that good to him, he would have bought them. We had some conversation there. I couldn't remember just all of it. I delivered all my cattle on the Denver market. I had previously sold part of them and sold part of them on the Denver market. I think I probably sold about a thousand head on the Denver market. I had 440 of those Alamo cattle in Denver.

Q. But confine yourself, please, to what you did with Alamo cattle.

A. I sold them. I had part of these cattle contracted before they went to Denver and part of them were sold on the Denver market. I am not able to state what part of the cattle that I bought from the Alamo I sold on the Denver market, because I had

(Testimony of Thomas J. Donohue.)

them mixed with other cattle.

I visited the Distilladero ranch with Mr. Kibbey on the 8th of May, 1913, and examined cattle there at that time. I think those cattle were the same cattle which I subsequently bought. There is no doubt whatever in my mind about it.

Cross-examination.

(By Mr. STONEMAN.)

I think I examined between 2000 and 2500 head at Distilladero Ranch on the 8th of May. I had no occasion to examine those [238] cattle between the 8th and the time I bought them which was about the 20th of May.

Mr. SEABURY.—Will you pardon an interruption? I don't recall whether I asked the question which I called this witness to establish. May I ask him?

The COURT.—Go ahead.

Mr. SEABURY.—Mr. Donohue, in your opinion as a man experienced in cattle, and particularly in Terrazas cattle, are you able to say whether or not, the cattle which you subsequently bought from the Alamo Cattle Company about the 20th of May and which you saw on the 9th and 13th of May, were or were not as good or better than Terrazas cattle?

A. I think they were fully as good or better.

(Mr. STONEMAN—Continuing.)

I paid \$23 a head for those cattle. I testified that on the 20th of May I bought 940 head. I also testified and swore that those were the same cattle I ex-

(Testimony of Thomas J. Donohue.)

amined on the 8th of May, to the best of my knowledge.

Q. Didn't you swear positively they were?

A. To the best of my knowledge I swore they were.

Q. You want to qualify your statement now by the further statement that it was only to the best of your knowledge?

A. I think if you will look over my statements you will find I said I had no reason to doubt they were the cattle. They looked like the cattle, they were branded the same, and as near as I could tell were the same cattle. I did not examine that herd of cattle by brand. I couldn't tell you whether they had earmarks. I didn't look to see whether they had earmarks or not. They were not distinct in color, size or ages, so I could positively identify them to that extent.

Q. All looked alike?

A. Yes, they are in size and quality and so forth.
[239]

Q. If these cattle were driven into a herd of 3,000 your intimate knowledge of these cattle based upon the reasons you have given, you could go into the herd and drive out these cattle?

A. I could if they were all branded different. I looked at most of these cattle. What cattle I did see were branded Alamo brand. I think all the cattle I bought at that time had the Alamo brand. I wouldn't swear to every head of them. I counted them in the stockyards when I bought them; received them in the stockyards. I counted them as we re-

(Testimony of Thomas J. Donohue.)

ceived them. My men tallied them in the cars through the chute. When I counted them I was not counting them for brands. Just counting for numbers for ages. We never buy them by ear-marks. Where these cattle were held from the 9th to the 20th of May is ordinary Mexican pasture. Comparing it with the feed on other parts of the ranch owned by the Alamo Cattle Company, I would say it was just a good deal like the rest of it. Well, none of that pasture is very good down there, only in the rainy season. At that time it was not very good, just ordinary condition for Mexican pasture. My contract called for two year, three year olds. I found some yearlings after we got to town.

Q. Out of the same bunch which you testified when you examined them on the 8th, were all as good or better than Terrazas cattle and full two's?

A. I didn't say they were full two's. When I cut the cattle at the Distilladero Ranch, I cut out some cattle. Cut back the usual percentage of undesirable cattle. They had sold some cattle previous to the ones I had received. When I first looked at this bunch of cattle there was about 2,000 head in the bunch. They sold some of the two and three year old steers out of there and cut back from the old steers were in these cattle when I came to receive them and I cut back what I wanted to. From the herd I bought from the Alamo Cattle Company on the 20th of May. When I went to receive them, the herd was, I judge, [240] about between 1250 and 1300 cattle in the herd. To the best of my knowledge

(Testimony of Thomas J. Donohue.)

that included the cattle that I saw on the 8th which were gathered for tender to Ha. I couldn't tell you exactly how many short ages I cut out. Altogether I cut out about 300 head, I should judge. I didn't count them. Leaving a balance of 940. There were 175 three year olds and up out of 940. I bought them for three years and up. There were quite a large percentage of four's. The steers I bought older than 2's I bought them for 3's and up so I didn't count them four's as I took them all at three years old. I cut back about 300 unmerchantable, short ages and cattle I didn't care to take, on my contract. To the best of my knowledge those were identically the same cattle which were tendered to Hall on the 9th.

Mr. STONEMAN.—That's all.

Redirect Examination.

(By Mr. SEABURY.)

These cut backs that I eliminated out of the herd were just as good as any of the cut backs out of the Terrazas cattle. In the cattle that I bought I did not find any runts. Out of the cattle that were tendered to me on the 20th, as I have explained, I cut back out of say approximately 300 cattle, I cut back about 300 cattle. Of those 300 cattle I cut back, they were undesirable cattle in my opinion, undesirable to me, might be blind, might be runt, might be sway-back or for some reason, I cut those cattle back. In the cattle that I examined on the 20th there were no substantial number of runts. There were no substantial number of stags, just about like there would

(Testimony of Thomas J. Donohue.)

be in an ordinary herd of cattle of that kind. No substantial number of cripples or lump-jaws, nor of sway-backs, nor of blind cattle. No extraordinary number of any of those classes. Nor cattle too thin to ship. Nor any extraordinary number of unmerchable cattle. [241] I was to have about a 15 per cent cut, I think, on that cattle. I don't believe I could say whether I cut more or less than 15 per cent. I cut the herd down until they stopped me and took 940 head. That's the way I usually cut cattle. No objection was raised to my cutting.

Q. How many full two year old steers were there in the herd?

Mr. STONEMAN.—We object to that as not proper redirect examination.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except. My recollection was, your Honor, that Mr. Stoneman asked some questions about the two year olds. Perhaps I should have gone into it on direct.

Mr. STONEMAN.—I asked him how many two's there were and he said there were none.

Mr. SEABURY.—I beg your pardon.

Q. You said in response to Mr. Stoneman's question, as I recall it, there were 175 three year old steers and up?

A. Yes, sir. There were 693 two year olds, as good or better than Terrazas cattle, in my opinion.

Mr. SEABURY.—That's all, Mr. Donohue.

(Testimony of Thomas J. Donohue.)

Recross-examination.

(By Mr. STONEMAN.)

I couldn't tell you the exact numbers of those two year olds that I loaded in these cars, but we usually load about 40 head of these cattle in a 36 foot car. Well, all the way from 15 36-foot cars make up a train-load. 15 would be a small train-load. I have gotten trains for ten and twelve cars. I say that I had 940 all together. I'll give you the exact figures. I've got them right here if you will write them down. 22 yearlings that we found in the yards after we got to town. 348 two year olds and 70 three's and up. 70 head of three year olds and up. And then the cattle that was to go to Canada was 385 head of two year olds, and 115 three's and up. These were all out of the same [242] cattle. You see I sold 175 head in Nogales. I am giving you the way I sold them and the ones I took to Denver myself. There were no other yearlings in the other shipment. There were 115 and 70 three's and up.

The COURT.—I understood you to say there were 175 three year olds and up. 620 two years old.

Mr. SEABURY.—However, his mistake is merely adding of the figures of his memorandum.

A. There were 115 in one bunch and 75 in another which made 185 instead of 175. I didn't count the ones I cut back; they were approximately 300. They were undesirable for various reasons. Probably some of them thin. I didn't notice any tender-

(Testimony of Thomas J. Donohue.)

footed. I had various reasons for cutting back each steer, I suppose.

Q. You were trying to cut cattle as good or a better grade than Terrazas cattle?

A. I was getting cattle that suited me for the price. I didn't have anything to do with Terrazas cattle at that time. There was nothing like that. If the cattle suited me it didn't make any difference whether they were as good or a better grade than Terrazas cattle.

Q. You didn't examine them for the purpose of determining whether they were as good or better, or look them over for general appearance?

A. Oh, yes, I examined them. I don't buy a herd of cattle without sizing them up.

Q. But if an animal looked good to you, it wouldn't make any difference if it was as good as Terrazas grade or not, provided it suited you?

A. That's what I was buying them for, if they were worth the money.

Redirect Examination.

(By Mr. SEABURY.)

The three hundred I stated I cut out included the 15% cut.

Recess until 1:30. Jury duly admonished and excused. [243]

At 1:30 P. M. this day, both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court and thereupon the following further proceedings were had herein, to wit:

Court convened at 1:30 P. M.

[Testimony of Ben Sneed, for Defendant.]

Mr. BEN SNEED, being called as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is Ben Sneed. I reside in Douglas. I am in the cattle business. I have been engaged in it about thirty years, in Arizona and in Mexico, Sonora and part of Chihuahua. I bought cattle in Chihuahua and I bought them all over the northern part of Sonora. I know a brand of Mexican cattle called Terrazas cattle. In a general way, the Terrazas cattle are a little light-boned, and they don't weigh much. That is the opinion I always had of them. They are recognized as a brand of Mexican cattle. All the experience that ever I had with them is I seen them in the El Paso yards in El Paso, Texas. I haven't ever seen them on the ranges. I have seen five or six thousand head of Terrazas cattle in the El Paso yards from one time to another for the last three or four years. I have seen them three years old, and I seen a bunch there about a year and a half old; I seen two bunches. I think I am able to recognize Terrazas cattle when I see them. I saw a bunch of cattle what Mr. Donohue bought about May 20th, 1913, of the Alamo Cattle Company. I saw part of them in the pasture, at the Distilladero ranch, and the rest of them I saw when when the shipped them at Nogales. I think the cattle which I saw as having been bought by Mr.

(Testimony of Ben Sneed.)

Donohue at the time stated were just as good as or better than Terrazas cattle. That is my opinion. This fellow that bought them in Cananea, he asked me to go down there with [244] him and look them over. I went down with him and I looked around through them and came back. I don't think there were any stags in that bunch of cattle. There were no runts. I noticed no cripples. I noticed no lump-jaws. I noticed no sway-backs. I noticed no blind cattle. I did not inspect them that close. But there was none there. I did not notice any that were too thin to ship. I did not notice any that were unmerchantable. I would call them full age stuff. They were bought for twos, two year olds, and I would call them two year old steers.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. STONEMAN.)

I saw no stags in the bunch that Donahue had at Nogales. I think it was on the 9th, wasn't it? I forget the date. There might have been some that looked a little staggy, but he had a right to cut them out. That is my construction of the contract. There might have been some that were under two's, and he had the same right to cut them out again. It wasn't the seller's fault. My designation of the grade of these cattle is based partly upon the fact that if there were any there the buyer had the right to cut them out.

Q. So there might have been some there, might there not? You testified, you know, that you did not

(Testimony of Ben Sneed.)

inspect them close enough to see whether there were any sway-backs or cripples or blinds.

A. Well, I did not see any.

Q. Well, I understood you to testify that you did not inspect them close enough for that.

A. Well, I looked at them pretty close, and I did not see no sway-backs. I walked through them.

Q. Walked through them. Would you be willing to swear unequivocally that all that bunch was full two year olds?

A. No, I would not. The general grade of Terrazas cattle show a predominant red color, almost all of them. [245]

Mr. STONEMAN.—That is all.

The COURT.—That is all, Mr. Sneed.

[Testimony of A. M. Joffroy, for Defendant.]

Mr. A. M. JOFFROY, being called as a witness on behalf of the defendant herein, having been previously sworn, was examined and testified as follows:

Direct Examination.

(By Mr. BARRY.)

My name is A. M. Joffroy. I am a stenographer employed by the Southern Pacific Company at Nogales, Arizona. I attend to correspondence and file it, that is all. I am familiar with the files of the Southern Pacific Company, at Nogales, Ariz.,—with reference to orders for cars for shipments out of Nogales, Arizona.

Q. I hand you a letter dated El Paso, Texas, April 28th, 1913, and ask you if that was received by the

(Testimony of A. M. Joffroy.)

Southern Pacific Company at Nogales, Arizona
(handing paper to witness).

A. Yes, sir, it was.

Mr. BARRY.—That is Defendant's Exhibit 3, already admitted in evidence. This, Gentlemen, has already been read to the jury. It is addressed to the agent of the Southern Pacific Company, Nogales, Arizona. "Dear Sir: We are in receipt of a letter today from Mr. Kibbey in which he advises us that he placed a definite car order in our name for cars in which to load the first shipment of the cattle purchased from him. Under date of February 7th, we placed an order with you, our file No. 2, for 150 forty-foot Santa Fe cars, and the order that Mr. Kibbey has just placed is referring to this order. Will you kindly furnish us with information as to how many cars Mr. Kibbey has ordered and whether or not they are Santa Fe forty-foot cars. For your information, beg to state that we wish to order all of our cars to be forty-foot Santa Fe cars. Trusting to receive this [246] information from you by return mail, beg to remain, yours truly, K. D. Oliver, Manager."

I have got the file of the Southern Pacific Company with me.

Q. Now, here are three letters and telegrams. I will ask you if that is the complete file of the Southern Pacific Company in reference to stock order No. 10 for 150 forty-foot Santa Fe stock cars, ordered by K. D. Oliver to be loaded at Nogales, Arizona, during the months of April and May, 1913.

(Testimony of A. M. Joffroy.)

A. Yes, sir.

After the receipt of the letter of May 5th, 1913, from J. G. Hall, the Southern Pacific Company wired Tucson for placing an order for thirty-two cars.

I know whether the Southern Pacific had on hand on May 12th the thirty-two stock cars which had been ordered by K. D. Oliver for use by him on May 10th, 1913. They did not have those cars on the 12th. In the mean time, twenty-five of those cars had been delivered to J. E. Roberts & Company, after K. D. Oliver cancelled the order.

Mr. BARRY.—That is all.

Mr. STONEMAN.—No questions.

A JUROR.—I would like to ask the witness if his duties as stenographer also comprised for him to know as part of that duty the number of cars in the yards at Nogales.

A. Yes, sir.

Mr. STONEMAN.—Q. It does, eh?

A. Yes, sir.

Mr. STONEMAN.—In view of the question I would like to ask another question.

The COURT.—Come back Mr. Joffroy.

Cross-examination.

(By Mr. STONEMAN.)

Q. You say, as a matter of fact, that there were not other cars in Nogales which were available to be used by Mr. Oliver some time in the future, three or four days?

A. They had only thirty-two forty-foot stock cars.

(Testimony of A. M. Joffroy.)

Santa Fe stock cars. [247]

Q. What day?

A. On the 9th. I don't remember whether they had any more cars there on the 10th.

Q. Did you have any more cars there on the 11th that might have been used by Oliver?

A. We did not have any. We gave twenty-five cars to Mr.—

Q. Let me ask—Do you know whether or not you had any cars there that might have been used by Oliver or Hall on the 10th? Can you say whether or not there were cars there or whether there were not? Isn't it possible, Mr. Joffroy—

A. Yes, we did.

Q. You had? A. We had, yes.

Q. Now, then, isn't it possible, notwithstanding the fact that this particular order of thirty-two cars may have been cancelled, as it was, that Mr. Oliver and Mr. Hall by arrangement with your superiors in office in the Southern Pacific Company might not have arranged for fifteen to twenty cars on the 10th?

A. They did not.

Q. On the 11th?

A. I mean on the 11th they did not.

Q. On the 12th? A. No, sir.

Q. They couldn't have done that?

A. No, we would have a memo, on file showing that.

Q. You speak for the superintendent?

A. For the agent.

Q. For the agent at that place? A. Yes, sir.

(Testimony of A. M. Joffroy.)

Q. And you testify to that? Do you mean that they did not order cars?

A. They did order the cars, but we cancelled the order on the 9th.

Q. No, but in your testimony do you mean to say that they did not order any more cars between the 9th and 12th; or do you mean—

A. They did not order any more cars.

Q. Now, could they not have ordered some and received them? A. I should say yes.

Mr. STONEMAN.—That is all.

Redirect Examination. [248]

(By Mr. SEABURY.)

It is a fact that when any orders for cars are given to our superior or our office, that there is always a memorandum in writing made and filed with that particular office. All the time.

I know how many empty cars that nobody had ordered were in the yards of the Southern Pacific Company ready for immediate use on the 10th, 11th, 12th or 13th of May, 1913. Santa Fe stock cars, there were only thirty-two.

Q. And is it not a fact that you used twenty-five of those for someone on receiving Mr. Oliver's telegram?

A. Yes, sir; twenty-five of them Mr. J. E. Roberts—the balance of the thirty-two remained in the yards. Those were all that kind of cars that we had.

Mr. SEABURY.—That is all.

(Testimony of A. M. Joffroy.)

Recross-examination.

(By Mr. STONEMAN.)

We don't keep cars there ready for any shipper who wants them. The order is sent to Tucson.

Q. Where there may be a surplus of vacant cars?

A. Tucson.

Q. Couldn't an order have been sent in to Tucson and the cars been down there in less than a day—you don't know that that isn't true, do you?

A. Well, it takes them sometimes two days to bring the cars. Sometimes three days. It all depends on whether they have the cars on hand.

Q. Oh, yes. But suppose they had the cars on hand in Tucson, couldn't they have wired to Tucson for those cars and had the cars down in Nogales in a day?

Mr. SEABURY.—We object to that, if your Honor please, because it assumes a state of facts that hasn't been proved; namely, it has been proved that there were no such cars on hand at Tucson.

Mr. STONEMAN.—I did not assume there were; I said suppose there [249] were.

Mr. SEABURY.—Well, we think you might just as well say assuming that they were; just a difference in terminology; that is all.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't that true?

A. Yes, sir. So the mere fact that we had given the use of these cars to someone else on the 9th would not have prevented Mr. Hall or Mr. Oliver from

(Testimony of A. M. Joffroy.)

wiring to Tucson and having the cars down there for the 12th, if they had use for them. They could have secured them on the 12th, notwithstanding they canceled the order for the cars that they ordered on the 9th.

Q. You would not expect people to order cars unless they had use for them, would you? Now, Mr. Witness, isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground that the proof of custom is not admissible—not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Q. Have you ever known people, anyone else, besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.

Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove that or disprove [250] that issue.

(Testimony of A. M. Joffroy.)

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain date to cancel that order and reorder in the event they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Yes, sir.

Mr. STONEMAN.—That is all.

[Testimony of E. W. Myers, for Defendant.]

E. W. MYERS, being called as a witness on behalf of the defendant herein, having been previously sworn, was examined and testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is E. W. Myers. I am in the cattle business at El Paso, Texas. I have been in the cattle business all my life. I have traded about fifteen or seventeen years, in Texas, New Mexico and Arizona and Mexico, Chihuahua, Sonora. I have been familiar with the Terrazas cattle seven or eight years. I know Terrazas cattle when I see them. I know Mr. Kibbey, Mr. Elias, Mr. Hall and Mr. Oliver. I made the original contract that is being sued on in this case on the 16th day of January last year with the Alamo Cattle Company. Cattle were shown to me at that time at Mr. Elias' and Mr. Kib-

(Testimony of E. W. Myers.)

bey's ranch, known as the Alamo ranch and the La Moraga, I believe, is the name of it; two ranches west and northeast of Magdalena. I saw them with Mr. Oliver. Along about the latter part of January or the first of February; I couldn't give the exact date. I showed Mr. Oliver then as near as I could the same cattle that I saw when I bought [251] the cattle. And shortly thereafter I made Defendant's Exhibit "B," which is the contract between myself and Mr. Hall. I signed it with Mr. Oliver, on the 4th day of February, I think it was, 12th or 13th. After that I again saw the cattle on the 10th day of May, I think it was. I did not see them between February and May. On the 10th of May I went out from Nogales to look at the herd of cattle, that bunch of cattle that was in the herd up at the Distilladero Ranch, they call it. That is the ranch that is nine miles south of Nogales. Mr. Gillespie and Mr. Elias went with me. Neither Mr. Hall nor Mr. Oliver were there at that time. I saw a herd of steers, two year olds—well, supposed to be two year olds, most of them two year olds. Those cattle were similar to the cattle which I had previously shown to Mr. Oliver. I next saw those cattle on the 13th, I think it was, at the same ranch that I saw them on the 10th. On the 13th Oliver and Mr. Hall and Mr. Gillespie, Mr. Elias and myself and the cowboys were present. I am practically sure about the date being the 13th. Wait a minute. Wait about that 13th just a minute. I believe the next time I saw those cattle was on the 12th instead of the 13th. We left

(Testimony of E. W. Myers.)

shortly after the arrival of the Nogales train from Tucson. We arrived where the herd was and went out and began to look through them, and Mr. Hall said, I think the first thing he said was, that he did not think there was twenty carloads there. He did not think he could get twenty carloads out of there, and I think the next thing he said was that he did not consider them equal to the Terrazas cattle. I told him that I thought that the contract did not call for twenty cars, but called for a train-load. Well, he said, "I don't think there is a train-load of cattle there." "Well," I says, "Mr. Hall, cut them and show me whether or not there is a train-load of cattle here or not." And we began discussing points, and he said that he did not think that [252] there were that many two-year old steers in the herd. I asked him then how he could ascertain whether or not there was fifteen cars or more or less until he had cut the cattle down according to contract. And he said that it was useless, that he did not think the number of cattle was there. Well, we were standing about—he was sitting on a horse—he had ridden through the herd—he was sitting on his horse as a steer passed by and he says, "What do you call this one?" I says, "A two year old." Another one passed and he says, "What do you call that one?" I says, "I think it is a two year old." And I think it was the third or fourth steer that passed he says, "What is that?" And I says, "I think it is a two year old." And he says, "I will bet you five dollars." "Well," I says, "I will bet you twenty-five."

(Testimony of E. W. Myers.)

He says, "No, I will bet you five." Well, I reached in my pocket and got five dollars and handed it to Mr. Hall, sitting on his horse, and a Mexican and I caught the steer, throwed it down and he showed two full-grown second growth teeth. Then I says to Mr. Hall, I says, "That is evidence, Mr. Hall, that you cannot look at a bunch of cattle and ascertain whether or not they are so many of a certain number, or more or less, in the herd of cattle." I says, "Cut them and show me where I am wrong." He says he thought it was useless; he did not think they were there. We talked along on the matter; I don't know just the exact conversation that took place, but he finally did cut seventeen cattle and said, "That is the kind of cattle we want." I told him that I didn't blame him; that he was trading in Mexico instead of the United States; and that those cattle were equal to the native cattle in our country. And he said, "Yes, those are good cattle in any country." The seventeen head—he had reference to the seventeen head that he cut out. I could not say positively why he cut them, but he said those are the kind of cattle we want. He didn't cut in my presence any yearlings [253] out of the herd. He didn't cut any other defectives. I don't know that he pointed out any other unmerchantable cattle in that herd, but he said there were some cattle in there not under the contract. My response was that a man was cutting on the other side and throwing out that kind of stuff. I requested him to make the cut. It was quite a herd. I don't know how many. I judged—it was pretty

(Testimony of E. W. Myers.)

closely thrown together, and there were a thousand to thirteen, maybe fourteen hundred, possibly a few more.

They were throwing out, working on unmerchantable cattle. There were some stags in there. I don't think there were a great many. I did not see any cripples or lump-jaws. I don't remember seeing any sway-backs or blinds. I don't remember seeing any cattle they could not ship. The unmerchantables are covered by the runts, blinds, cripples, and such stuff, and cattle too thin to ship. I could not say that I saw any number—possibly a few. Well, I considered the big majority of the number in the herd were two year olds. It is my opinion that there was a train-load lot of two year old steers as good as or better than Terrazas cattle in that herd at that time. I don't think I had any further talks there on the ground with Mr. Hall about these cattle. We talked the matter over in Nogales after we left the herd that evening and went to town. Mr. Hall insisted that the cattle were not according to contract; that they were not as good as Terrazas cattle, and not in shipping condition. I cannot recall the entire conversation, but there is another thing that did take place. I asked Mr. Hall if he would take his forfeit money back and return me the contract. He said he ought to have a thousand dollars for expenses and time he was out in the transaction. I told him I would not consider it. I was present at a discussion of this matter in Nogales after I came [254] back from the ranch on the 12th or 13th in

(Testimony of E. W. Myers.)

which Mr. Hall and Mr. Elias and Mr. Kibbey and myself took part. I did not make a *bona fide* offer, but I asked if he would take the ten thousand dollars back and let me have the contract. That took place in the park almost directly in front of the First National Bank, under one of the big trees, on a seat. He said he thought he ought to have a thousand dollars if he was out time and expense on this deal. I told him I would not consider it. That was the evening of the day we had looked at the herd of cattle at the Distilladero Ranch. I had further talks with Mr. Hall on this subject, on two occasions. I think the first time was in Deming. I could not give the exact date, but it was some time early in the spring—it must have been some time in April, 1913. We just passed between trains. I was catching the train for El Paso. He told me that Mr. Oliver had sold the cattle. These same cattle I had sold to Mr. Oliver.

The other conversation was afterwards. It must have been in June, the latter part of June or the first of July. I cannot recall the exact date. I asked Mr. Hall what he was going to do about this case. He said he did not know. And in discussing the case I asked him if he did not think he made a mistake in refusng to cut the cattle, and he said, "yes," that he thought he made a mistake in not cutting them. That is about the extent of the conversation, as I recall.

Mr. SEABURY.—That is all.

312 *Alamo Cattle Company, Sociedad Anonima,*
(Testimony of E. W. Myers.)

Cross-examination.

(By Mr. STONEMAN.)

Q. In that last conversation you testified to having had with Mr. Hall, in which you said that Mr. Hall said he thought he made a mistake in not cutting the cattle, did he not add to that, as a reason, that if he had cut those cattle, there would [255] have been no question about there not having been a train-load?

A. No, I don't think that was brought up. I do not recall any further conversation about it at that time. To the best of my recollection, there was nothing said about that reason. All he said in that conversation was that he made a mistake in not cutting the cattle. I would not say that was all—a natural line of conversation after that, but I don't think there was anything bearing on the transaction. I don't remember anything.

Q. Mr. Myers, in your testimony—I did not object because I did not suppose you meant it—you made use of the term: the cattle that I sold to Mr. Hall. You don't mean that you showed him five thousand head of cattle which you sold him—you mean you sold the rights under the contract?

A. I don't mean I showed him five thousand head of cattle. I mean that I sold to Mr. Hall the rights I had to the delivery of certain cattle under the contract I had with the Alamo Cattle Company. I showed Mr. Oliver in January or February as near as I could the same cattle I saw when I bought the cattle, in the same pasture.

I cannot swear that the cattle which the defendant

(Testimony of E. W. Myers.)

tendered to Hall on the 9th of May were the same bunch of cattle which I showed Hall in January or the early part of February, nor would Mr. Oliver have any right to expect them. No more than I would have the right to say they were the same. I showed as near as I could under their contract with me the cattle that were shown to me under the contract with the Alamo Company. If I had pursued my contract with the Alamo Cattle Company I would have expected cattle coming up to that grade. I would have expected them to be according to the contract. I say that there were one thousand to thirteen or fourteen hundred head that I saw. I first saw these on the 10th, and I again saw them on the 12th. I am pretty positive. I can look up the data, but I am positive it was the 12th. I don't think there were less than a thousand or [256] more than fourteen hundred.

Q. Don't you think it possible for a cattleman of your long experience to estimate a bunch of cattle more close than four hundred head?

A. I could, perhaps, but when a bunch of cattlemen get together, they could be long or short, but I don't think there is any chance—I think the happy medium is between the two. I don't think I would be four hundred off, the total number of which was fourteen hundred.

I think there were a few stags in there. I don't know how many. I don't think there were many in there too thin to ship. There may have been a few. I am not prepared to say that they were all full two

(Testimony of E. W. Myers.)

year olds. I did not see any three's or four's in that herd. I don't think there were cattle over three years old in that particular herd. I think there were some in there that were not full two year old steers at that date. I could not say what proportion were not full two's without cutting them down to ascertain—it is impossible. Sometimes you are mistaken. Sometimes you think you are right, and you are wrong; sometimes you think you are wrong, and you are right.

Q. Then, this five-dollar bet—that was a pretty onery looking steer?

A. He was small, but in good condition. I don't think Mr. Hall at that time pointed out five or six more which he offered to bet were not full two year olds. I never won a dollar when I did not give him a chance to break even.

Q. Did he not ask you to say whether or not this steer was more than two years old?

A. He may have asked the question, but I think that ended it.

Q. You never took him up?

A. I don't think he challenged or said: "I will bet five dollars that is a two year old," or I would have given him a chance to break even.

Q. If Hall had pointed out a steer and said: "I will bet you five [257] dollars that is not a two year old," and you agreed, you would not have bet?

A. That depends.

Q. If you agreed that it was not a full two year old, you would not have bet again with him?

(Testimony of E. W. Myers.)

A. What is that?

Q. If you agreed that the steer was not a full two-year old, you would not have bet?

A. Certainly, if he picked out one—there is no question.

He possibly did pick out a steer and say, "There is a steer that is not a full two year old." I don't think he did two or three. I could not say how many. What I thought you were trying to get out was that he offered to bet five dollars that that steer was not a full two year old.

Mr. Hall cut out seventeen head. Out of that seventeen head he called my attention to some of them. He said there is a possibility of even some of those cut out not being full aged steers. I did not question him. I said it is possible, that you don't have to take them. He did not offer to show them to me—did not offer to tooth them. We only toothed one animal that I saw.

He was riding around among the herd, and he could have toothed some cattle I did not see. That was the only one I saw. I don't think any of the seventeen head were toothed. I did not tooth any more at all.

Q. No two's to which your attention was directed by Hall that those were not full two year olds?

A. What is that?

Q. That is immaterial, anyhow. You don't claim simply because you won a five dollar bet with Mr. Hall as a mistake of judgment that as to the fourteen hundred head Mr. Hall was incompetent to judge the age of the cattle?

(Testimony of E. W. Myers.)

A. I do say this: that a man cannot ride up and say that among a herd of a thousand or fourteen hundred two year olds, there were twenty carloads and ten carloads or what. [258]

I do not mean to say that because Mr. Hall was mistaken in calling my attention to one steer out of fourteen hundred as to the age of it, that he is incompetent to judge as to what is or what is not a full two year old steer; but I do contend that he cannot tell whether there is fifteen carloads in there or ten carloads until he has cut those down and shown those that differ in appearances.

If a seller was under contract to furnish a train-load of full two-year olds, I would apply the same rule to the seller as to the buyer, if he was selling full two-year olds at the time of the delivery. I am absolutely not interested in any way in the outcome of this suit. I was naturally interested at the time of these different conversations in sustaining the contention of the Alamo Cattle Company that these cattle claimed to have been tendered were contract cattle. In the first place, in the contract there was three dollars a head profit to me on the two year olds and four dollars a head on the four year olds if the cattle were delivered.

Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract; that the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two year old steers and four dollars a head for the four year old steers only in case

(Testimony of E. W. Myers.)

they are delivered.

Mr. SEABURY.—Now, we object to that, if your Honor please, upon the ground that such testimony requires Mr. Myers to construe as a question of law the effect of the contract between him and Mr. Hall, and upon the ground that it is incompetent and not within the issue of this controversy and not tending to establish any interest of Mr. Myers in this case.

The COURT.—Objection overruled.

A. Yes, sir.

(By Mr. STONEMAN.) [259]

The only condition upon which I could hold Hall to the contract was if they were delivered.

Mr. STONEMAN.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

From the first of January up to probably the first of April the market value of Sonora cattle as good as or better than Terrázas cattle in Nogales advanced, and after that they depreciated like in most every spring. I would say that it was lower in May, 1913, than it was a short time prior.

Mr. SEABURY.—That is all.

The COURT.—You are excused.

Mr. SEABURY.—The defendant rests, if your Honor please.

REBUTTAL.

[**Testimony of John G. Hall, in His Own Behalf
(Recalled in Rebuttal).**]

JOHN G. HALL, called as a witness in his own behalf, in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I heard the testimony of Mr. Myers with reference to a conversation in which Mr. Myers stated that I said that I had made a mistake in not cutting the cattle at the time they were offered at the Distilladero Ranch in Mexico. The conversation was this: We were discussing the circumstances as they happened, and I told him that I thought it would have been better if we had gone ahead and cut out of the cattle that there was in the herd all that did comply with the contract because we would have convinced the Alamo Cattle Company beyond a doubt that they did not have a train-load. He said he could not tell about that. He did not know whether they did or did not have a train-load. [260]

Mr. STONEMAN.—That is all.

Mr. SEABURY.—That is all.

Mr. STONEMAN.—The plaintiff rests.

And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it remembered that during the trial of this cause further proceedings were had as follows:

Mr. SEABURY.—If your Honor please, on behalf of the defendant, I desire to renew the motion made at the close of the plaintiff's case for a directed verdict in favor of the defendant and against the plaintiff, and that plaintiff take nothing from the defendant in this case, upon the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendant in this case; particularly, in that it appears from the evidence of the plaintiff that after the alleged breach of the contract sued upon and on or about May 12th or 13th, 1913, another and different contract than that which was the subject of this suit was made and entered into between him and the defendant, Alamo Cattle Company, and also upon the ground that such proof constitutes a variance between the pleadings and the proof in this case, which is fatal to the plaintiff's case herein, and upon the other grounds urged at the close of the plaintiff's case.

The COURT.—As I construe the evidence of the witnesses, the conversation which took place between Mr. Hall and Mr. Kibbey was in the nature of negotiations looking to a settlement of this litigation, and was not a contract which took the place of the original written contract, and I think I am supported in that by the letter of May 13th written by the defendants to plaintiff, in which they attempted to or did cancel the written contract, [261] and by the telegram sent by the Alamo Cattle Company to K. D. Oliver and signed by W. B. Kibbey, dated May 13th, in which it is stated that "Myers refuses to com-

promise; advise if you want to go ahead with our further agreement." So the motion is overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—I direct your Honor's further attention in support of your Honor's ruling to the testimony of the witness Elias, who, in answer to the questions propounded to him by counsel for defendant, stated that his understanding the conversation was that it was an endeavor on the part of the parties present at the conversation to find some way to settle this lawsuit.

The COURT.—All right.

[Instructions Requested by Defendant.]

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

"By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to deliver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good as or better than Terrazas cattle."

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury

retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant [262] fifteen (15) days’ notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time, and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and to pay for them when they were placed on board of the cars furnished by the plaintiff.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this

cause and at the proper time, and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three hundred (\$7,300) dollars in addition the defendant is entitled to recover from the plaintiff by way of counterclaim.” [263]

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage if any were sustained by it over and above the said ten thousand (\$10,000) dollars by reason of the plaintiff's breach of the contract.”

Which instruction the Court refused to give, to

which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrazas cattle, and that plaintiff refused to receive them, then you must find a verdict for defendant.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider [264] their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that the provision in the contract which required the buyer to give 15 days’ notice before the delivery of each shipment was a provision for the benefit of the seller.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in

writing the Court to give the jury the following instruction:

“I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer, during April or May, 1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that it was not contemplated by the terms of the contract sued upon that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. [265] A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram of May 14th.”

Which instruction the Court refused to give, to

which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that, even if you find that the cattle tendered to plaintiff on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause further proceedings were had; the Court charged the jury as follows:

[Instructions of Court to Jury.]

“GENTLEMEN OF THE JURY:

“It now devolves on the Court to state to you the law regarding this case. If I state the testimony, I shall do it for the purpose of calling your attention to it, and stating its tendency. If I intimate an opinion on a disputed question of fact you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are. I do not intend to state the testimony, but should I state any part of it and make a mistake in so [266] doing or in alluding to any fact in the case, you will correct it by your

own recollection and judgment. I shall endeavor to state to you the law which covers this case and it is your duty to take the law from the Court.

“While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole and not give undue importance to minor points or to portions of the evidence taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, oral and documentary, in the case. You will examine the testimony calmly, carefully and impartially, and announce the result of your verdict.

“This is an action at law, brought by James G. Hall, a citizen of the State of Colorado, as plaintiff, against the Alamo Cattle Company, S. A., of the State of Sonora, Republic of Mexico, for the recovery of \$20,000, together with interest thereon from May 13th, 1913, claimed by plaintiff to be due him by defendant, by reason of the alleged nonperformance by defendant of a contract for the purchase and sale of cattle.

“The complaint alleges, in substance, as follows: The plaintiff at all times mentioned in the complaint was and is a citizen of the State of Colorado; that defendant corporation was and is a corporation organized and existing under the laws of the Republic of Mexico, and engaged in the business of raising and

buying cattle at Nogales, Naco and Douglas, Arizona, this corporation having been represented on and before January 16th, 1913, in the State of Arizona, [267] by its President, W. Beckford Kibbey, Jr., and by its Secretary, one Ramon Elias.

“That E. W. Myers on the 16th of January, 1913, and the 4th day of February, 1913, was a citizen of the State of Texas; that on said last-mentioned dates said Myers might have prosecuted in his own name in this court this cause of action upon a certain contract hereinafter mentioned.

“That on January 16, 1913, said cattle company, the defendant therein, at Nogales, Arizona, entered into a contract with said E. W. Myers of El Paso, Texas, by the terms of which it agreed to deliver to him not less than four thousand nor more than five thousand head of two year old steers, and one thousand head of four year old steers, same to be delivered f. o. b. cars at Nogales, Arizona, all duties and expenses thereon to be paid by defendant; the cattle to be delivered in train-load lots during the months of April and May, 1913, and all to be branded as set out in the contract. That said Myers should furnish cars; that all of said cattle should be of a grade as good or better than the cattle known as ‘Terrazas cattle,’ and that Myers should be permitted to cut out and reject 15% of all of said cattle, after certain specified unmerchantable cattle had been cut out by defendant. That upon delivery of said cattle as above set out, said Myers should pay (subject to certain conditions and reservations) to said defendant, through its said President and Secretary,

\$23.00 per head, United States Currency, for all two year old steers, and \$28.00 per head, United States Currency, for all four year old steers; of this defendant acknowledged receipt of \$10,000 as a partial payment on same, and said Myers agreed to pay the balance of said purchase money, when said [268] cattle above described should be delivered on board cars at Nogales, and failing to pay said balance, said Myers, should forfeit said \$10,000 and any further amount advanced under the contract. That should defendant fail to deliver such cattle, of the grade, brand and description, and in the numbers and at the times mentioned in the contract, then defendant should pay to said Myers \$2.00 per head for all cattle which it so failed to deliver, and should return said \$10,000 and any further amounts advanced under the contract, as a forfeit and in liquidated damages to said Myers. That said contract was executed January 16th, 1913, and on that date said Myers paid to W. Beckford Kibbey, Jr., President of said defendant corporation, the sum of \$10,000 acknowledged in said contract.

“Plaintiff further alleges that on February 4th, 1913, for a good and valuable consideration, said Myers did assign said contract to him, James G. Hall, the said contract and all the rights and interests therein held by the said Myers, including any and all claims for damages and rights of action against defendant, and that plaintiff, on said 4th day of February, 1913, and ever since, has been and is the owner and holder of all rights, claims and causes of action which have accrued or might have accrued to said

Myers as against defendant, under the terms of said contract.

“Plaintiff further alleges that during all times during the months of April and May, 1913, plaintiff was ready and willing to comply and did comply with the terms of said contract, and that during the month of April, and up to the 13th of May, at which time defendant notified him that it would not perform the terms of said contract, he was at the town of Nogales, Arizona, ready to receive said cattle. That the cattle tendered to him up to May 13th, 1913, were not cattle tendered in train-load lots as good or better than the ‘Terrazas cattle,’ or of the kind, grade, character, brand or numbers required under the terms of the [269] contract.

“Plaintiff alleges that upon the failure of defendant to comply with the terms of said contract, and prior to the commencement of this action, he demanded from the defendant the return to him of the sum of \$10,000 paid by said Myers to defendant through its President, Kibbey, and also demanded the sum of \$2.00 per head on 4,000 head of two year old steers and 1,000 head of four year old steers, making an aggregate sum demanded by plaintiff from defendant of \$20,000, which plaintiff claims is due from defendant to plaintiff under the terms of said contract, but that defendant refused and still refuses to pay to plaintiff said \$20,000, whereby plaintiff is damaged in the sum of \$20,000.

“To this defendant has filed its amended answer and counterclaim, alleging in substance as follows:

“That its knowledge as to the citizenship of either

Hall or Myers is insufficient to form a belief; denies the remaining allegations of the complaint, except to its own citizenship, admits that it executed the contract with said Myers, above referred to, and that it refuses to pay to the plaintiff the sum of \$20,000.

“For a separate defense, defendant alleges, that it is a corporation organized and existing under the laws of the Republic of Mexico, that it has been and now is duly authorized to transact business in the State of Arizona, and has a place for the regular transaction of its business at Nogales, and that it has in all respects complied with the laws of Arizona relating to foreign corporations.

“That on or about January 16th, 1913, defendant made a contract with E. W. Myers, being the same contract hereinbefore referred to in plaintiff's complaint; on information and belief, defendant alleges that on or about February 4th, 1913, said contract [270] was by said Myers assigned to J. G. Hall, the plaintiff herein, and that thereafter and thereupon, said Hall agreed to perform all of the terms and conditions of said contract required to be performed by said Myers.

“That at all times during the months of April and May, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract by it to be performed, and did duly and fully comply with same, until the plaintiff refused to perform the terms and conditions on his part to be performed; that early in April, 1913, defendant tendered to plaintiff 1,000 head of cattle of kind and quality agreed in said contract, which plaintiff refused to ac-

cept; that on or about May 9th, 1913, defendant tendered to plaintiff between 1,200 and 1,500 head of cattle of the agreed kind and quality, and on May 13th, 1913, 1,093 cattle of the same kind and quality, but that plaintiff refused to receive said cattle, and failed to furnish cars for loading same, and made no arrangement satisfactory to the First National Bank of Nogales, Arizona, for payment of the purchase price of said cattle, although payment thereof has been duly demanded and has wholly failed to perform the terms and conditions of said contract to be by him performed.

“Defendant also alleges that the value of the cattle described in said contract is of a fluctuating character, and the amount of damages which defendant could sustain by reason of plaintiff’s breach of contract, uncertain and not readily ascertainable, and said sum of \$10 a reasonable and usual sum to be paid to defendant as liquidated damages and not as a penalty or forfeiture for breach of said contract.

“For a counterclaim, defendant alleges that, in order to perform said contract, defendant purchased and gathered 5,000 head of cattle of the required kind and quality, and was obliged [271] to hold them for delivery to plaintiff during April and May, 1913, at great expense, by reason of plaintiff’s failure to receive them, that the cost of same was \$1.00 per head, making an aggregate of \$5,000.00; that defendant lost by death at least 200 head of said cattle, entailing a further loss of \$3,600; that defendant was obliged to hold 2,000 head of said cattle, being unable to sell them, until the month of November, 1913, en-

tailing an additional loss of \$6,000; and that at least 150 head of said 2,000 cattle died, costing defendant \$2,700 more, making a total loss of \$17,300.00, of which defendant has received no part except the \$10,000 received upon the date of making said contract with said Myers.

“The Court has ruled in this case that defendant is not entitled to recover of the plaintiff the \$7,300, or any part thereof, set up or claimed in its counter-claim or cross-complaint. Therefore, it will be unnecessary for you to consider any evidence with regard to such claim.

“As I will presently charge you, if you find for the defendant, your verdict will mean that the defendant is entitled to retain the \$10,000 already paid to it, but no other sum or sums whatever.

“You are instructed that all the rights that Ed. W. Myers had under that contract sued upon, have been transferred to the plaintiff and all of the duties assumed by Ed. Myers have been assumed by the plaintiff and that the defendant has accepted the assignment of the contract to the plaintiff.

“You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff to show that cattle alleged to have been tendered on May 9th, and 12th, 1913, fully complied with the contract in every respect.

“You are instructed that if you believe the cattle tendered [272] on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the

defendant, dated May 13th, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.

“You are instructed that under the contract sued upon, there can be no tender of cattle by the defendant to the plaintiff, unless the cattle are of the contract, quality and ages and in train-load lots.

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship; unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.

“You are instructed that if you find from the evidence and believe that plaintiff was ready and willing and able to receive and pay for all cattle, in the numbers, of the ages, brands and quality required under the terms of the contract sued upon, and if you further find from the evidence and believe that the defendant failed in any respect to comply with the terms of said contract (provided you further

find that such non-compliance on the part of the defendant [273] was not occasioned by the act of the plaintiff), you should find a verdict for the plaintiff in the full sum of \$20,000 as prayed for in plaintiff's complaint.

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.

“You are instructed that under the terms of the contract, it became the duty of the defendant to gather and tender to the plaintiff, merchantable cattle of full ages as required under the terms of the contract, that is to say, all two year old cattle, must have been full two years old at the time of the gathering and offer to the plaintiff, or must have been full four years old and the plaintiff is not required under the contract to accept any cattle, less than full two years old.

“You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide cars for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all the duties and expenses on board cars at No-

gales, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, [274] Arizona.

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff, cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15% of clean, contract merchantable cattle and still leave a train-load lot to be delivered on board cars at Nogales, Arizona.

“You are instructed that the contract sued upon is an assignable chose in action, by which term is meant, so far as this case is concerned, that the obligation was laid upon the defendant of fulfilling with plaintiff, all of the conditions of the contract provided to be complied with by defendant under its contract with Ed. W. Myers and that the plaintiff on his part is charged with the duty of complying with all the conditions to be performed under the terms of the contract by Myers and that both the defendant and the plaintiff, are, by the assignment of the contract by Myers to the plaintiff, vested with whatever rights, claims for damages, suits at law or

in equity, which might have been claimed or prosecuted either by Myers or the Alamo Cattle Company under the terms of the contract, before the assignment by Myers to the plaintiff.

“You are instructed that under the terms of the contract sued upon, defendant has no right to require plaintiff to accept delivery of any cattle in less numbers than train-load lots. Unless, therefore, you find from the evidence and believe that on or before the 12th of May, 1913, defendant in the Republic of Mexico did gather and offer for acceptance [275] by plaintiff, cattle of the kind, character, quality and brands specified in the contract, and in numbers, which, after cutting out 15% would constitute a train-load, you cannot find that the defendant complied with the terms of the contract.

“The contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff's right of recovery in this action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event, the plaintiff need not show his readiness and ability to perform the contract.

“Gentlemen, I repeat: The contract makes the payment of the balance of the purchase payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition

precedent to the plaintiff's right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

“If you find that the defendant tendered and offered cattle to the plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle, and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle, then the defendant broke the contract and the plaintiff is entitled to a verdict.

“If you find that the defendant tendered and offered to the plaintiff, the cattle called for in the contract, in the [276] quantity and of the ages specified in the contract, and that such cattle were as good as or better than Terrazas cattle, then the verdict must be for the defendant.

“If you believe that the cattle tendered to the plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff's part, which relieved the defendant from any further duty to be performed on its part and justified the defendant, the Alamo Cattle Company in writing the letter dated May 13th, declaring the plaintiff's rights in the contract forfeited.

“You will observe that the contract provides that the buyer was required to give 15 days' notice for

each delivery of cattle in train-lots during the months of April and May, 1913, furnish the cars at Nogales, Arizona, to receive the cattle and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and testimony in this case, it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to [277] be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues

are the main issues to be submitted to you for your determination.

“I think, gentlemen, I will repeat that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material,—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle.

“If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the [278] contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or bet-

ter than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plaintiff the cattle called for in the contract, in the quantity and of the ages specified and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.

“By the terms of the contract, the seller agreed to sell and deliver the cattle called for in the contract, f.o.b. cars at Nogales, Arizona, all duties and expenses paid, but if you find from the evidence in this case that on or about May 9th or May 12th, 1913, the defendant, the Alamo Cattle Company, tendered to the plaintiff herein a train-load of cattle, in the numbers and of the ages, brands and quality required under the terms of the contract, and further believe that the plaintiff declined to receive or accept said train-load of cattle, upon the ground they were not of the numbers, brands, ages, grade and quality required under the terms of the contract and not on the ground that the defendant did not deliver the same f.o.b. cars at Nogales station, all duties and expenses paid, then it is not incumbent upon defendant to show to prove that this particular tender or

offer of these particular cattle were delivered f.o.b. cars [279] at Nogales, Arizona, all duties and expenses paid.

“In other words, gentlemen, it appears, and the evidence tends to show, I might say the evidence does show, that there was a breach of this contract by either the plaintiff or the defendant on or about the 9th of May, or May 13th, 1913, and I have told you that it is for you and for you alone to determine who breached the contract and what the main issue or issues were in this case.

“Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 13th, 1913, then it is not material to inquire whether or not the defendant the Alamo Cattle Company loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona. In other words, it was the duty of the defendant upon receipt of fifteen days’ notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to

gather and deliver f.o.b. cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if [280] the plaintiff declined or refused to receive same, then it is not necessary in this case that the defendant should go further and show that the cattle were delivered f.o.b. cars at Nogales Station, all duties and expenses paid.

“On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.

“If you believe from the evidence in this case that the defendant, the Alamo Cattle Company, on or about May 9th or May 12th, 1913, tendered to the plaintiff Hall, a train-load lot of cattle, and further believe that same were not in the numbers and of the ages, brands, grades and quality required under the terms of the contract sued upon, that they were not as good or better than Terrazas cattle and that for that reason the plaintiff declined to receive or accept same and did not accept the same, then the

defendant, the Alamo Cattle Company, was not authorized to breach the contract and its letter to the plaintiff Hall, dated May 13th, declaring the contract forfeited, was unauthorized and wrongful and constituted a breach of the contract on the part of the Alamo Cattle Co. That is, provided, I said, that you find from the testimony that the cattle tendered were not in the numbers and of the ages, brands, grades and quality required by the terms of the contract.

“On the other hand, if you believe from the testimony that the defendant, the Alamo Cattle Company, on or about said time above mentioned tendered to the defendant Hall, a train-load [281] of cattle and further believe that same were in the numbers and of the ages, brands, grades and quality required by the contract and that the cattle were tendered in full compliance with the terms of the contract and that plaintiff Hall declined to receive them or accept them and did not accept them, then the defendant, the Alamo Cattle Company, was justified in writing the letter dated May 13th, 1913, declaring the contract forfeited and at an end.

“The jury are instructed that the burden is upon the plaintiff, and it is for him to prove every material allegation of his complaint by a preponderance of the evidence. If upon any one or more of the material allegations of the plaintiff’s complaint, the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover and the jury should find for the defendant. By preponderance of the evidence is meant the weight of evidence; that which on the whole, when fully, fairly

and impartially considered by the jury produces the stronger impression upon the mind of the jury and is more convincing as to its truth, when weighed against the evidence in opposition thereto.

“A fair preponderance of the evidence does not necessarily mean that a greater number of witnesses shall be produced on one side or on the other, but that, on the whole, the jury believe the greater probability of the truth be upon one side rather than upon the other.

“I charge you that you are made by law the sole judges of the facts in the case and of the credibility of each and all of the witnesses who have testified before you in the case and of the weight you will give to the testimony of the several witnesses who have appeared before you.

“In determining the credibility of any witness and the weight you will give to his testimony, you have the right to [282] take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other evidence and the facts and circumstances of the case. If you believe that any witness has wilfully sworn falsely as to any material fact in the case, you have the right to wholly disregard that witness' testimony, except in so far as his statement may be corroborated by other credible evidence or by the facts and circumstances proven in the case. You should not be influenced by any consideration other than the evidence that is be-

fore you, and the law, as I have presented it to you in these instructions.

“Should you find for the plaintiff, the form of your verdict will be, ‘We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff and assess his damages at the sum of \$21,225,’ being the amount claimed, with interest at the legal rate of 6% on \$10,000 from May 13 and on \$10,000 from June 1st. If you find for the defendant, the form of your verdict will be, ‘We, the jury duly empaneled and sworn in the above-entitled action, upon our oaths do find for the defendants.’ As I have heretofore charged you, should you find for the defendant that means that the defendant is authorized to keep the \$10,000 heretofore paid to it by Mr. Myers as liquidated damages.

“I think I have given all the requests asked by either side and not refused.”

The defendant then and there at the proper time and before the jury retired excepted to parts of said charge, which parts were given at request of plaintiff as follows: [283]

“You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect.”

Because the burden of proof was on the plaintiff to show a breach of the contract by the defendant.

Defendant further excepted to part of said charge,

which part was given at request of plaintiff as modified as follows:

“You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the defendant, dated May 13th, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.”

Because said charge is incomplete, in that it justifies the plaintiff in treating the contract as at an end without requiring proof on his part that he had performed the conditions of the contract to be by him performed up to the time of the breach of the contract and that he was ready, willing and able to perform the contract on his part.

The defendant further excepted to part of said charge as follows:

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respects as to grade and quality with the requirements of the contract and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the [284] contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin

to ship, unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.”

Because such charge directs the jury to find that defendant had breached the contract if there were any such defective animals in the herd tendered by it, even if the jury found that there were only one or two or a very small number of the animals described in the herd so tendered, and because even if the jury found that there were a few such defective animals in said herd, the said tender of said herd might nevertheless have been good under the contract and the plaintiff would thereupon be under the duty to designate and cut out such defective cattle in said herd.

The defendant further excepted to part of said charge as follows:

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15% of clean, contract, merchantable cattle and still leave a train-load lot to be delivered on board cars at Nogales, Arizona.”

Because it authorized the jury to find that the defendant's tender of cattle was not in compliance with the terms of the contract even though the jury found that there were only a few defective cattle in the herd

so tendered by defendant, and authorized [285] the jury to find that the plaintiff was under no obligation to designate or cut out such cattle as it considered defective but could refuse to accept said herd even though there were very few defective cattle in said herd.

The defendant further excepted to part of said charge as follows:

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.”

“You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide care for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all the duties and expenses on board cars at Nogales, Arizona. Unless therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.”

“The contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff’s right of recovery in this [286] action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

“Gentlemen, I repeat: The contract makes the payment of the balance of the purchase payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff’s right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company, refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.”

“You will observe that the contract provides that the buyer was required to give 15 days’ notice for each delivery of cattle in train-lots during the months of April and May, 1913, furnish the cars at Nogales, Arizona, to receive the cattle and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and tes-

timony in this case, it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff, and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase [287] price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers of the brands, ages, grades, and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues are the main issues to be submitted to you, for your determination.

“I think, gentlemen, I will repeat; that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of

whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, [288] ages, grades and quality required under the terms of the contract—whether or not the plaintiff was justified in his refusal to take the cattle.

“If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plain-

tiff the cattle called for in the contract, in the quantity and of the ages specified, and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.”

“Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 12th, 1913, then it is not material to inquire whether or not the defendant the Alamo Cattle Company loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the Bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had [289] gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona. In other words, it was the duty of the defendant upon receipt of 15 days’ notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o. b. cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract, and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if the

plaintiff declined or refused to receive same, then it is not necessary in this case that the defendant should go further and show that the cattle were delivered f. o. b. cars at Nogales Station, all duties and expenses paid.

“On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.”

On the ground that such instructions withdraw from the consideration of the jury, the question of whether the plaintiff was in reality willing and able to perform the contract upon his part prior to any breach of the contract upon the part of the defendant, which question is a question of fact for the jury to decide. [290]

And upon return of the verdict the Court gave the defendant 30 days within which to prepare and file its bill of exceptions to the rulings of the Court made at the trial of this case, and thereafter by order entered June 27, 1914, the Court gave the defendant until July 15, 1914, within which to file its bill of exceptions.

Recital Re Exhibits.

The exhibits in this action, of which the following is a list, will be printed in the record on appeal in

354 *Alamo Cattle Company, Sociedad Anonima,*

accordance with the stipulation of counsel of the parties herein.

Original contract, Plaintiff's Exhibit "A."

Plaintiff's "B," Assignment of Contract.

Plaintiff's "C," Letter, defendant to plaintiff dated April 25.

Plaintiff's "D," Letter, Oliver to Kibbey, dated April 28.

Plaintiff's "E," Letter, Oliver to defendant, dated May 3.

Plaintiff's "F," Telegram, defendant to Oliver, dated May 3d.

Plaintiff's "G," Telegram, Oliver to defendant, dated May 4th.

Plaintiff's "H," Telegram, Oliver to defendant, dated May 5th.

Plaintiff's "I," Telegram, defendant to Oliver, dated May 7th.

Plaintiff's "J," Telegram, Oliver to defendant, dated May 8th.

Plaintiff's "K," Letter, defendant to plaintiff, dated May 13th.

Plaintiff's "L," Telegram, plaintiff to defendant, dated May 14th.

Plaintiff's "N," Telegram, Myers to Hall, dated May 11th.

Plaintiff's "O," Telegram, plaintiff to defendant, dated May 11th.

Plaintiff's "P," Contract between Hall and Clay-Robinson & Co.

Defendant's 1. Telegram, Oliver to S. P. Agent, dated May 9.

- Defendant's 2. Letter, Hall, by Dickson, to S. R.
May 24th.
- Defendant's 3. Letter, Oliver to S. P., April 28th.
- Defendant's 4. Letter, Hall per Dickson, to S. P.,
May 5th.
- Defendant's 5. Letter, Oliver to Hall, dated Feb.
4th.
- Defendant's 6. Letter, Oliver to Defendant, Apr.
21st.
- Defendant's 7. Telegram, Oliver to Kibbey, May
9th.
- Defendant's 8. Telegram, defendant to Oliver, May
13th.

**[Order Approving, Settling and Allowing Bill of
Exceptions.]**

The defendant having served its proposed bill of exceptions upon the plaintiff and the plaintiff having served the proposed amendments and corrections thereto upon the defendant, and the defendant having excepted and allowed said amendments and corrections, and the bill of exceptions being amended and corrected accordingly and duly filed and served herein, and the counsel for the respective parties have stipulated in open court that said bill of exceptions is correct, it is hereby certified that said corrected and amended bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, constitutes all the substantial testimony therein material to the issue, and it is

ORDERED that said bill of exceptions be and it

356 *Alamo Cattle Company, Sociedad Anonima*,
hereby is approved, settled and allowed this 1st day
of July, A. D. 1914, in term.

WM. H. SAWTELLE,
Judge.

[Endorsements] : No. 10 (Tucson). In the
United States District Court for the District of
Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle
Company, Sociedad Anonima, Defendant. Bill of
Exceptions and Order Allowing Same. Filed July
3, A. D. 1914. George W. Lewis, Clerk. By Effie
D. Botts, Deputy Clerk. [291]

*In the District Court of the United States in and
for the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for
the State of Arizona.

You will please prepare a transcript of the com-
plete record in the above-entitled cause to be filed in
the office of the Clerk of the United States Circuit
Court of Appeals for the Ninth Judicial Circuit
under the Writ of Error to be perfected to said court
in said cause, and include in said transcript the fol-
lowing proceedings, pleadings, papers, records, and
files, to wit:

Judgment-roll, except Answer but Including Amended Answer;

Transcript of Minute Entries;

Order Allowing Bill of Exceptions;

Bill of Exceptions;

Motion for New Trial;

Order Refusing a New Trial;

Petition for Writ of Error;

Assignment of Errors;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation; [292]

Praeceptum for Transcript;

Plaintiff's Exhibits, "C," "D," "E," "F,"
"G," "H," "I," "J," "K," "L," "N," "O,"
"P."

Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8,—
and all other records, entries, pleadings, proceedings,
papers and filings necessary or proper to make a
complete record upon said writ of error in said cause,
said transcript to be prepared as required by law
and the rules of this Court and the rules of the
United States Circuit Court of Appeals for the Ninth
Judicial Circuit.

FRANK J. BARRY,
WILLIAM M. SEABURY,
Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the Dis-
trict Court of the United States in and for the
District of Arizona. John G. Hall, Plaintiff, vs.
Alamo Cattle Company, Sociedad Anonima, Defend-

358 *Alamo Cattle Company, Sociedad Anonima*,
ant. Praeipie for Transcript of Record. Filed
July 7, 1914. George W. Lewis, Clerk. By Effie D.
Botts, Deputy Clerk. [293]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the United States District Court for the District
of Arizona.*

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

United States of America,
District of Arizona.—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 193, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of John G. Hall, Plaintiff, vs. The Alamo Cattle Company, Sociedad Anonima, Defendant, No. 10 (Tucson), as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error, and Citation, in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$183.00 and that the same has been paid in full by the appellant, The Alamo Cattle Company, Sociedad Anonima.

by its complaint appears, *we willing* that error, if any hath, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California, in said Circuit, within thirty days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of June, A. D. 1914, and of the Independence of the United States the one hundred and thirty-sixth.

Allowed:

WM. H. SAWTELLE,

U. S. District Judge.

[Seal] Attest:

GEORGE W. LEWIS,

Clerk of the United States District Court for the District of Arizona.

By Effie D. Botts,
Deputy Clerk.

[Endorsed]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle

Company, Sociedad Anonima, Defendant. Writ of Error. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error. Received Jul. 18, 1914. F. D. Monckton, Clerk. Filed Jul. 27, 1914. F. D. Monckton, Clerk.

[Citation on Writ of Error (Original).]

*In the District Court of the United States for the
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,
Defendant.

The President of the United States to John G. Hall
and to Stoneman & Ling, and Loomis and Knol-
lenberg, Your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit Court
of Appeals for the Ninth Circuit, to be holden at the
City of San Francisco, California, in said circuit,
within thirty (30) days from the date of this writ,
pursuant to a writ of error filed in the clerk's office
of the District Court of the United States for the
District of Arizona, wherein the Alamo Cattle Com-
pany, Sociedad Anonima, is plaintiff in error, and
you are defendant in error, to show cause, if any
there be, why the judgment in said writ of error
mentioned should not be corrected, and why speedy

362 *Alamo Cattle Company, Sociedad Anonima*,
justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court, this the 24 day
of June, 1914, and of the Independence of the United
States the one hundred and thirty-sixth.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

[Endorsed]: In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Citation. Service of a copy of the within citation is hereby admitted. June 24, 1914. Stoneman & Ling and Loomis & Knollenberg, Attorneys of Plaintiff. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Received Jul. 18, 1914. F. D. Monckton, Clerk. Filed Jul. 27, 1914. F. D. Monckton, Clerk.

[Endorsed]: No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Alamo Cattle Company, Sociedad Anonima, a Corporation, Plaintiff in Error, vs. John G. Hall, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received July 18, 1914.

F. D. MONCKTON,
Clerk.

Filed July 27, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALAMO CATTLE COMPANY, Sociedad Anonima,
a Corporation,

Plaintiff in Error,

vs.

JOHN G. HALL,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States
District Court of the District
of Arizona

Filed

OCT 7 - 1914

FRANK J. BARRY,

F. D. Monckton,
Clerk.

WILLIAM M. SEABURY,
Attorneys for Plaintiff in Error.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

ALAMO CATTLE COMPANY, Sociedad Anonima, Plaintiff in Error,	}
vs.	
JOHN G. HALL, Defendant in Error.	}

BRIEF IN BEHALF OF THE PLAINTIFF
IN ERROR.

This is a writ of error directed to the United States District Court of Arizona to review the proceedings and judgment entered on May 29, 1914, in the said United States District Court upon a verdict of a jury in favor of Defendant in Error and against Plaintiff in Error.

STATEMENT OF FACTS.

On the 16th day of January, 1913, the Alamo Cattle Company, Sociedad Anonima (hereinafter called the "Company"), entered into a contract for the sale of cattle with one E. W. Myers (p. 306). By the terms of the contract the company agreed to sell to Myers from 4,000 to 5,000 two-year old steers and 1,000 four-year

old steers "as good or better than the Terrasas cattle." The price was to be twenty-three (\$23) dollars per head for the two-year olds, and twenty-eight (\$28) dollars per head for the four-year olds. The cattle were to be delivered f.o.b. at Nogales, Arizona, station, all duties and expenses paid by the Company. The buyer was to furnish the cars for the cattle, and payment was to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line. The buyer was to have the privilege of cutting out and rejecting fifteen (15%) per cent of the cattle after all unmerchantable cattle had been cut out by the Company. The Company acknowledged receipt of ten thousand (\$10,000) dollars from the buyer, who agreed to pay the balance of the purchase money when said cattle were delivered on board cars, and failing to do so he was to forfeit that amount. The Company agreed to pay two (\$2) dollars in addition to returning the forfeit, on each head it should fail to deliver; this was to constitute the buyer's entire claim for damages. The cattle were to be cut at Moraga or Distilladero. The buyer was to give fifteen (15) days' notice for each delivery in train-load lots during April and May. (Exhibit A, p. 9.)

The Company is a Mexican corporation and owns two ranches in the State of Sonora, Mexico; one called La Moraga, 56 miles south of Nogales, and the other called the Distilladero, about 9 miles from Nogales (p.

253). The Company bought and sold Mexican cattle, often selling on commission (p. 214). At La Moraga ranch the Company held its main herds, while the Distilladero ranch was used as a delivery point (pp. 246, 271).

About February 4, 1913, Myers assigned the contract to Hall, the plaintiff below (pp. 129-130). The consideration was the repayment of the ten thousand (\$10,000) dollars advance money and in addition three (\$3) dollars per head on the two-year olds and four (\$4) dollars per head on the four-year olds (pp. 11-12).

Witness K. D. Oliver was Hall's fully authorized agent in this entire transaction (p. 144).

About April 6, 1913, Mr. Oliver went to La Moraga to show Mr. Johnston and Mr. Moore the cattle. Mr. Johnston was manager of Clay, Robinson & Company, who later contracted to purchase from Hall the two-year olds under the contract (p. 41). Mr. Moore was a cattle man from Denver, and was also a prospective purchaser (pp. 160, 254). These gentlemen were pointed out cattle of the kind which would be delivered them under the contract (p. 161). At that time the Company was ready to deliver a train load of two-year old steers; but Oliver requested that the deliveries be deferred until May. Accordingly, Oliver gave the Company notice about April 22d that he wanted a train load of two-year old steers at Nogales about the 10th of May (pp. 48, 215).

The Plaintiff, on receipt of this notice, at once began to round-up the cattle at La Moraga and to move to Distilladero all the cattle which came under contract after Ramon Elias, who with Mr. Kibbey represented the Company, had cut out the unmerchantable cattle (pp. 257, 261). The cattle arrived at Distilladero about May 5th.

On May 3d the Company wired Hall that they would have at least one train load for the 10th of May (pp. 34, 161). Oliver replied that he would arrive at Nogales on the 9th to cut "two-year old steers" (p. 33).

Accordingly, on May 9th Oliver went with Mr. Johnston of Clay, Robinson & Company and a Mr. Howe, who was one of Mr. Hall's employees, to inspect the cattle at Distilladero (pp. 161, 259).

On arriving there Oliver and Johnston rode through the herd on horseback. After a while they came out and Mr. Johnston told Elias the cattle were too thin to ship (pp. 259-261). Elias heard Oliver trying to persuade Johnston to take the cattle but in vain, for Oliver then asked Elias for three days in which to take up the matter with another prospective customer of Clay, Robinson and Company at Tucson. Elias agreed (p. 260).

About the 12th of May, Oliver came back with Plaintiff Hall and a man by the name of Gillespie and went with Elias to Distilladero (p. 262).

After Hall and Oliver had inspected the cattle for a little while, Hall came out and declared that the herd contained too many unmerchantable cattle and that the cattle were not according to the contract (p. 262). Hall also stated to Mr. Myers, who, with his partner, Mr. Tankersley, was also present, that there were a whole lot of yearlings there. Myers then bet with Hall as to whether or not a steer pointed out by Hall as a yearling was one, and won his bet, as the steer proved a two-year old on the teething test (p. 262, 265). Hall, nevertheless, refused to cut out from this herd a train load lot, but selected about twenty-five of the best white face, red and best colored cattle as the steers he expected to receive under the contract. Elias told him that that was not the kind of cattle referred to in the contract. Hall refused to make any attempt to cut unmerchantable cattle on the ground that there were not more than four hundred fifty to five hundred two-year old steers after all unmerchantable cattle and cattle not in condition to ship were cut out (pp. 136, 266).

They then returned to Nogales, where Hall conferred with Kibbey, who was the president of the Company (pp. 213, 220). Kibbey assured Hall that the cattle tendered for delivery as above set forth complied with the contract in every way (p. 220). A compromise agreement was discussed. Mr. Hall then left Nogales. On May 14, 1913, Hall wired to the Company that he

would be ready to receive all cattle coming within the contract between May 29th and June 1st, 1913, in train load lots (p. 138-139). It is to be remembered at this point that the contract clearly did not contemplate delivery of all the cattle at one time (p. 10).

On May 14, 1913, Hall received a letter from the Company advising that it considered the contract forfeited by Hall owing to his failure to cut or receive the cattle tendered on the 12th of May, 1913 (pp. 39, 138).

The summons was served on February 27, 1914. The complaint averred the contract between the Company and Myers, the payment of ten thousand (\$10,000) dollars by Myers to the Company, and the assignment of the contract to Hall who is the owner and holder of all the rights thereunder. The complaint also included allegations of readiness and willingness to perform until May 13, 1913, on the part of Hall, that the Company had failed to deliver to Hall cattle in the numbers, of the grade, brand, kind and character required by the contract, and that the Company had on May 13, 1913, notified Hall in writing that it would not make any delivery to him except of cattle of the kind already tendered. 'This tender was alleged not to have been within the terms of the contract because the cattle were not "in train load lots as good or better than the "Terrasas cattle" or of the grade, kind, character, brand or numbers required under the terms of said contract.' The complaint demanded the return of the ten thousand (\$10.-

ooo) dollars prepayment and in addition the two (\$2) dollars per head damages provided for by the contract, aggregating a further ten thousand (\$10,000) dollars.

The answer puts in issue the material allegations of the complaint.

The Assignment of Errors will be discussed as follows: Under Point I, Error XXIX (See Record, p. 113); under Point II, Errors II, VI, XVII, XX, XXI, XXVIII and XXXI (See Record, pp. 84, 90, 107, 109, 113 and 116); under Point III, Errors VIII, XXIV, XXX (See Record, pp. 92, 111 and 114); under Point IV, Errors III, IV, V, VII, IX, X, XIII, XIV, XV and XVI (See Record, pp. 86, 87, 89, 91, 93, 94, 102, 103, 105 and 106); under Point V, Error XVIII (See Record, p. 108), and under Point VI, Error XXXII (See Record, p. 121).

POINTS.

I.

THE BURDEN OF PROOF WAS NOT UPON THE COMPANY TO SHOW THAT THE CATTLE TENDERED ON MAY 9th AND MAY 12th, 1913, FULLY COMPLIED WITH THE CONTRACT IN EVERY RESPECT.

At the request of Plaintiff below the Court gave following instruction to the jury (p. 332).

“You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff, to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect.”

This instruction was duly excepted to at the proper time (p. 345), and was assigned as Error XXIX in the Assignment of Errors (p. 113).

We discuss this clear error at this point because an understanding of its extremely prejudicial character must be based on some review of the evidence on the question involved.

This action, as we have already shown, was based on an alleged breach of contract on the part of the Company in failing to deliver cattle in accordance with the provisions of the contract involved. The specific breach alleged was that the cattle tendered to the plaintiff by the Company did not comply with the contract (p. 7). In order for the plaintiff to recover it was clearly necessary that this breach of contract on the part of the Company should be proved. This breach was the gist of the action.

The evidence on the question whether the cattle tendered Hall on the 9th and 12th of May, 1913, complied with the contract, i. e., consisted of a train load of two-year old steers “as good or better than the Terrasas cattle” after all unmerchantable cattle and fifteen (15%)

per cent of the balance had been cut out, was conflicting. In summary form it was as follows:

Hall testified: that he saw the tendered herd on about the 13th. He did not count the number but was told there were eleven hundred (1100). He had been familiar with Terrasas cattle, and these were not as good by several dollars a head (p. 134). He told Elias that the herd contained nearly one-half yearlings (p. 135). There were not more than 450 to 500 head of cattle of the grade mentioned in the contract (p. 136). He cut out 8 or 10 steers from the herd which were under age (p. 137). A train load consists of somewhere between 650 to 750 head of cattle (p. 140). Fully 40 per cent of the cattle tendered were yearlings (p. 145). Hall lost a bet with Myers as to whether a certain steer was a two-year old or not. Thirty-five (35%) per cent would be the extreme limit of the cattle that would come under the contract after the contractual fifteen (15%) per cent had been trimmed out. This was characterized as a pretty good guess, based on looking over the herd (p. 146). Hall's sole ground for rejecting cattle tendered was that they were not as good as Terrasas cattle, and there was not a train load lot of them (p. 154). Fully ten (10%) per cent were too weak to ship, and fully forty (40%) per cent were yearlings (p. 155).

Oliver testified on behalf of plaintiff: that he had run a ranch adjoining the Terrasas ranch and knew Terrasas cattle (p. 160, 179). He inspected the cattle

on May 9, 1913. He thinks there were a trifle short of a thousand steers in that herd (p. 161). Not more than fifty (50%) per cent, if that many, about four or five hundred head, were contract cattle. This was without the fifteen (15%) per cent cut allowed by the contract. He told Elias that the herd was not properly tendered, not in shape for the buyer to cut (p. 162). On May 12th when Oliver inspected the cattle again, there were about the same cattle, possibly a hundred or two more (p. 165). About fifty (50%) per cent on this second day were contract cattle (p. 166). Hall and Oliver on horseback cut out cattle of the kind they wanted. There was not a sufficient number to make a train-load.

James A. Johnston testified on behalf of plaintiff: that he had been in the cattle business with Clay, Robinson & Company for fifteen (15) years (p. 185). Was told that herd of May 9th contained about twelve hundred (1200) head. Thinks this number substantially correct, but didn't count them. Not over twenty (20%) per cent of these steers were as good or better than Terasas cattle (p. 187-188). He just looked the herd over without counting them (p. 190). There were a good many swaybacks, sore-footed cattle and runts. He did not notice any lump jaws or blinds. Saw a number of stags and numerous cattle too thin to ship. Made estimate by riding through the cattle back and forth (p. 192). His particular duty for his company is loaning money on livestock (p. 192). There were a number of

short ages in that herd. He judged the cattle by the growth of their horns, size and general looks (p. 193). Examination of the teeth is considered a test of the age of Mexican cattle. Does not know in what respect the teeth of a two-year old differ from those of a yearling (p. 193). Does not regard the teeth test the best method. Has handled a great number of Terrasas cattle (p. 194). Clay, Robinson & Company buy cattle on commission. After he had seen the cattle Johnston told Oliver that they were not the cattle he had contracted for (p. 195). Had inspected Terrasas cattle in Denver during the last five years (p. 199).

W. L. Howe, an employee of Mr. Hall, testified for plaintiff: that he had been in the cattle business for twenty years, had worked in the State of Chihuahua, Mexico, for four years and was acquainted with the Terrasas cattle, having handled them and helped classify them (p. 200). He went to Distilladero to cut the cattle on the 9th of May. He judged that there were from 700 to 800 head in that herd. Did not ride through the cattle, but helped herd them. Hard to say, but possibly 300 or 400 were as good as Terrasas cattle. Seven or eight hundred constitute a train load. There were quite a lot of yearlings and a good many that were not as good as Terrasas cattle. Great many sore-footed. He saw no swaybacks, but there were some cattle too thin to ship and a few runts. He saw no cripples, blinds, lamp-jaws, stags or bulls (p. 201). Howe said that in his

opinion he didn't think the average of that cattle was up to the grade of Terrasas cattle. Howe arrived at his figure of 700 as follows: Mr. Kibbey said there were about 600 head in the herd and they put in some more (p. 202). About 50% of the 700 or 800 cattle were unmerchantable (p. 203). Howe rode around the herd. There were a bunch of yearlings in that herd (p. 204). The best way to tell a steer's age is by tothing it. It is a fact that the general appearance of Mexican cattle is frequently deceptive if the cattle are thin and have not a good growth. Did not "teeth" any of that cattle. Could not swear positively that those he regarded as yearlings were yearlings (p. 205).

James Gillespie's affidavit was read for the plaintiff. He testified that he was familiar with the grade of Terrasas cattle (p. 206). He inspected this cattle on May 13, 1913. There were not more than 400 head of cattle that complied with the contract.

W. Beckford Kibbey testified for the defendant: that he had been with the Company six years and before that he had had experience buying cattle for butchers (p. 213). On May 9th, 1913, he went with Oliver, Johnston, Howe, Elias and a man by the name of Farr to examine the herd that was ready to be cut. With consent of Oliver the Company sold 560 three and four-year olds out of that herd to Farr. The balance, consisting of about 1400 head, were then tendered to Oliver. Johnston, after he and Oliver rode through the steers, said that there were

many short ages. Kibbey replied that there could not be many as practically all Sonora cattle are born before the 13th of May in each year. Johnston stated also that the cattle were sore-footed because many of them were lying down. Kibbey said they did that because they were tame. Oliver then told Johnston, whose principal objection was that the cattle would not ship, that they would ship (p. 217). About half an hour later Oliver, who had been endeavoring to sell the cattle to Johnston, told Kibbey the cattle did not come up to the contract (p. 218, 223). There was fully a train load lot of contract cattle tendered on May 9th. Between 600 and 700 head constitutes a train load (p. 224). It is a matter of opinion whether a steer is a runt, a stag or a swayback. There might have been a few. He saw no cripples (p. 224). There were no cattle too thin to ship in that herd. About ten days later the greater part of that herd was shipped to Canada. Had counted the herd. At least three-fourths of that herd came up to contract (p. 225-226). The herd had already been cut when shown to Mr. Oliver and had been placed in condition (p. 226). The herd tendered had been cleaned, they were all contract cattle, but the Company would not have objected if they had cut a little more than fifteen (15%) per cent (p. 240). If cattle in a herd are tame many of them will lie down (p. 241). If cattle walk without limping that shows their feet are not tender (p. 242).

Ramon Elias testified for defendant: that he had

been engaged in buying and selling cattle in Sonora, Mexico, for about twenty years (p. 252). He was familiar with Terrasas cattle, having seen a great deal of them (p. 253). A train load consists of from 620 to 1500 head of cattle (p. 256). On May 9, 1913, they offered to Mr. Hall about 1300 two-year old steers (p. 257). Mr. Oliver and Mr. Johnston inspected the herd on horseback (p. 259). After a while Mr. Johnston came out and said, "I think these cattle too thin to ship." Oliver told Johnston they would ship. They then went back to Nogales (p. 260). Nothing was said about the cattle not being as good or better than Terrasas cattle. In Elias' opinion they were in reality better than Terrasas cattle. Elias had cut out all he considered runs before the cattle were sent to Distilladero. Saw no swaybacks or blinds. There may have been eight or ten head that might have gotten a little sore-footed on the drive from La Moraga to Distilladero. The cattle arrived at Distilladero about the 5th of May. Noticed no unmerchantable cattle in that herd (p. 262). On May 12th, Hall, after he had inspected the cattle, told Elias that there were too many unmerchantable cattle in the herd (p. 262). Elias asked Hall to show him the unmerchantable cattle. This Hall refused to do, except that he lost a bet to Mr. Myers as to whether a certain steer was a two-year old or not (p. 265). Hall cut out 25 of the white face, red and best colored steers and said "that is the cattle I want." Elias replied that that was not the kind he had offered in the contract (p. 266). The

Company did not expect Hall to trim the herd. Elias had trimmed the herd of all cripples, blinds and sway-backs and everything that he considered unmerchantable at La Moraga (p. 266). There may have been a few yearlings as it is practically impossible for one to cut out every one that is a yearling. The three and a half days' trip between La Moraga and Distilladero, ending on the 5th, did not make the cattle unmerchantable on the 9th of May. Elias counted the cattle offered on May 9th—there were between 1300 and 1400 head (p. 271). The cattle were in shipping condition on May 9th (p. 272). This same herd was shipped to Canada and Denver to witness Donohue (p. 273). Elias did not count the cattle again on the 12th of May. The number was, however, approximately the same (pp. 274, 276). All the cattle tendered on the 12th were contract cattle (p. 277). There may have been some short ages in the herd, but Hall would not point them out except in one case, and that steer proved to be a two-year old (pp. 278-279). Elias thinks they were all two-year olds (p. 281). Oliver could have cut any he thought unmerchantable, short aged, or unshipable (pp. 281, 282). There may have been some stags. There may have been a few that were pretty thin (p. 283). Elias had tendered what he thought was right; the customer could have cut more than fifteen (15%) per cent (p. 283).

Thomas J. Donohue testified for the defendant that: he was 37 years old, and had been in the cattle business

all his life in the United States and Sonora (p. 286). He was familiar with Terrasas cattle, having handled and seen a great many of them (p. 287). A train load of Terrasas cattle would be between 500 and 1,000 head. He bought 940 head of cattle from the Company on May 20th (p. 287). These cattle were fully as good and probably better bred cattle than Terrasas cattle. He shipped them on the 22d of May to Denver, and to Canada, Wyoming and South Dakota. They were in merchantable condition. He inspected these cattle at Distilladero on May 9th and 13th (p. 288). Witness Johnston saw some of these cattle at Denver, with the Company's brand on and said if they had looked that good to him he would have bought them (p. 289). The cattle he saw on the 9th and 13th of May, and which he bought on the 20th, were fully as good or better than Terrasas cattle (p. 290). In buying the cattle he cut out about 300 head out of about 1300, leaving 940, of which 175 were three-year olds, and 693 two-year olds and 22 yearlings (pp. 293, 294, 295). He was to have had a fifteen (15%) per cent cut. He cut the herd and no objection was raised to his cutting (p. 294). As long as the cattle he bought were worth twenty-three (\$23) dollars a head Donohue did not care whether they were as good or better than Terrasas cattle.

Ben Sneed testified for the defendant that: he had been engaged in the cattle business in Arizona, Sonora and Chihuahua, Mexico. He knows the Mexican brand

called Terrasas cattle. He thinks they are a little light-boned and don't weigh much. Had seen five or six thousand of them at one time or other at El Paso within the last four years. Saw the cattle Mr. Donohue bought from the Company on May 20th, 1913 (p. 297). Those cattle were just as good as or better than Terrasas cattle. Did not notice any unmerchantable cattle or any that were too thin to ship. They were bought for two-year olds. He would call them full age stuff. There may have been some that were under two. He inspected them pretty closely, but would not swear that all were full two-year olds (p. 299).

E. W. Myers testified for the defendant that: he has traded for cattle about fifteen years in Texas, New Mexico, Arizona, and Chihuahua and Sonora, Mexico. He had been familiar with Terrasas cattle seven or eight years (p. 306). About May 13th went to Distilladero with Oliver, Hall, Elias and others. He saw the herd there. The first thing Hall said was that there was not 20 carloads there. Myers told him that the contract called for a train load, that is to say at least 15 cars. Hall replied that there was not a train load of two-year olds there and that it was useless to cut them. Hall then lost a bet to Myers as to whether a certain steer was a two-year old, but Hall still insisted that it was useless to cut the cattle. Finally he cut seventeen of the best and said that that was the kind he wanted. He admitted that they would be good cattle in any country (p. 310).

He saw some stags, but saw no cripples, lump-jaws, swaybacks, blinds or cattle that could not ship. Possibly there were a few unmerchantable cattle in that herd. The big majority were two-year olds. There was a train load lot of two-year olds as good or better than Terrasas cattle in that herd (p 310). In the latter part of June, 1913, Myers met Hall, who told him he had made a mistake in not cutting the cattle (p. 311). There were from 1,000 to 1,400 head in that herd (p. 313). Myers was not prepared to say that all those cattle were full two-year olds; it is impossible to tell without throwing them down. Sometimes you are mistaken (p. 314). A man cannot ride up to a herd of 1,000 to 1,400 head and say that there were ten or twenty car loads or what not of two-year olds (p. 316). The value of cattle as good or better than Terrasas cattle at Nogales was less in May, 1913, than in April, 1913 (p. 317).

The conflict between the evidence of the two parties on the question of whether the cattle tendered on May 9th and 13th complied with the contract appears clearly from the above summary. There was also the fact that the contract between Hall and Clay, Robinson & Co., which was the sole means Hall had of performing the contract, passed on the fifteen per cent cut after all the unmerchantable cattle had been cut out, from Hall to Clay, Robinson & Co. (pp. 41, 156, 157). This, we submit, shows that Hall's attitude was that the cattle tendered by the Company had to satisfy Clay, Robinson & Company as well as Hall.

In view of all this, the extremely prejudicial character of the learned Court's error in instructing the jury that the burden of proof was upon the defendant to show that the cattle tendered on May 9th and 12th fully complied with the contract in every respect, readily appears. We submit, moreover, that the learned Court's general instruction that the plaintiff must prove every material allegation of the complaint by a preponderance of evidence in order to recover did not cure this important error. The instruction complained of was on a specific point and clearly modified the general instruction. That it was error, there can be no doubt.

This action is brought to recover part of the purchase price and liquidated damages because of breach of the contract. In chronological order the breaches assigned in the complaint were: tender of cattle that did not comply with the contract; notification in writing on May 13, 1913, that it would not deliver cattle of other kind and numbers than those already tendered; and failure to deliver cattle under the contract and to pay the twenty thousand (\$20,000) dollars demanded because of the breach of the contract on part of the Company (pp. 7-8). These allegations of the complaint were denied in the answer (p. 16).

This denial put in issue all the material allegations of the complaint, and placed upon plaintiff the burden of showing the facts constituting the cause of action alleged therein.

San Francisco C. Agency vs. Widemann, 124
Pac. 1056 (Cal.).

Sharp vs. State ex rel. Board, 99 N. E. 1072,
1079 (Ind.).

Hill vs. Crompton, 119 Mass, 376, 381.

The fact that plaintiff was called upon to prove a negative does not affect the question. In Wigmore on Evidence, Vol. IV, p. 3524, the learned author says:

“It is often said that the burden is on the party having the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance. The burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non-performance of a contract.”

New Albany vs. Endres, 42 N. E. 683, 686-687
(Ind.).

Boulden vs. McIntire, 21 N. E. 445 (Ind.).

Carmel Natural Gas & S. Co. vs. Small, 50 N. E.
476, 479 (Ind.).

Sawtelle vs. Sawtelle, 34 Maine 228.

The materiality of the allegation with respect to the tender of the cattle is evident. In order of time it was the first breach alleged in the complaint, and it appears clearly from the face of the complaint that it was the breach upon which the other alleged breaches depended. For, we submit, Paragraph VI of the complaint shows clearly that if the tenders of cattle were, contrary to the allegations, “of the kind, brand, character, or quality,

or grade, or numbers required" by the contract, then the whole structure of Hall's case would have fallen down. This results because Hall's readiness and ability to comply with the terms of the contract are alleged to have continued only up to the time of the receipt of notification from the Company that it would not deliver "other than the cattle of the kind, brand, character and numbers theretofore tendered" by the Company to Hall (p. 7). These tenders were thereupon alleged to be not within the contract. By these allegations Hall clearly assumed the burden of proving that the tenders of cattle did not comply with the contract.. *Sawtelle vs. Sawtelle*, 34 Maine 228. Moreover, the record shows that the validity of these tenders was, at the trial, made by Hall the principal issue of the case from the very start. Hall, indeed, adduced extensive proof, in the affirmative of his own case and not merely in rebuttal, that these tenders were not good under the contract. This evidence has been summarized above.

Each and every allegation of Paragraph VI of the complaint was denied by the answer (p. 16). Upon this issue and the others raised by the denials of the answer, the case went to trial. Under this plea the Company would have earned the judgment if Hall had failed to show that the tenders were bad. For as was held in *San Francisco C. Agency vs. Widemann*, 124 Pac. 1056, 1057, which was an action by a buyer to recover the purchase price, the burden of proof was upon the plain-

tiff to show the defendant's breach of the contract as alleged in the complaint, and if plaintiff first breached the contract without fault or failure of the defendant, no cause of action for the return of the money existed in favor of the plaintiff, and the defendant was properly permitted to avail himself of such defense under the general issue. Evidently, therefore, the denials in the answer were sufficient to raise all the issues upon which this case was actually tried.

The case having gone to trial and been tried on the issues raised by the denials contained in the first defense of the answer, which put upon plaintiff the burden of showing that the tenders did not comply with the contract, the burden is not shifted by the affirmative allegations that the tenders were in accordance with the terms of the contract contained in the separate defense (p. 20).

The object of the separate defense was to show that the contractual provision for the retaining by the Company of the \$10,000 prepayment did not provide for a forfeiture, but was in the nature of a provision for liquidated damages (p. 22). In pleading to the complaint the Company's counsel were obliged to provide for the possible claim by Hall that this contractual provision was for a penalty and that the \$10,000 should be returned to him on that account. For this reason the separate defense and the counter-claim alleging actual damage were inserted in the answer in anticipation of all possible contingencies. This question was not raised

at the trial, and consequently the Company relied solely on the first defense.

That these affirmative allegations in the separate defense did not shift the burden of proof, appears from the authorities which hold that a denial of the allegations of the complaint call upon the plaintiff for his proofs unaffected by further affirmative defenses of defendant.

Balmford vs. Grand Lodge, 42 N. Y. Suppl. 881, 883.

Fox vs. Held, 52 N. Y. Suppl. 724.

Botts vs. Vandament, 67 Cal. 332, 7 Pac. 753.

Amador County vs. Butterfield, 51 Cal. 526.

Moreover, Section 420 of the Civil Code of Arizona, 1913, provides that: "the answer may contain several different defenses."

Error in the instructions regarding the burden of proof is cause for a reversal.

Cole vs. Carter, 22 Tex. Civ. App. 456, 54 S. W. 914.

Particularly is this true in this case where, on the point in question, the evidence was very conflicting.

We submit, therefore, that because of this error alone reversal should follow.

II.

THE COURT ERRED IN ADMITTING AND EXCLUDING EVIDENCE AND IN ITS INSTRUCTIONS TO THE JURY WITH REGARD TO THE QUESTION OF READINESS, WILLINGNESS AND ABILITY ON THE PART OF THE PLAINTIFF TO PERFORM THE CONTRACT, AND IN ITS REFUSAL OF A NEW TRIAL BECAUSE OF FAILURE OF PROOF ON THAT SUBJECT.

This question was raised in the Assignment of Errors under Errors II, VI, XVII, XX, XXI, XXVIII, XXIX, XXXI (pp. 84-86, 90, 107, 109, 113, 116-121).

In the first place the learned Court erred in permitting the plaintiff to testify that he was ready, willing and able to pay for a train load of cattle (pp. 84-86, 141-142). This was a mere conclusion of the witness upon a matter that was not expert in its nature and was, therefore, immaterial and wholly insufficient to show readiness, willingness or ability to pay.

Goodrich vs. Sweeney, 36 N. Y. Super. Ct. 320, 325.

The contract placed upon Hall the following duty: "Payment of these cattle is to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Ariz., before each shipment crosses the line."

Accordingly, defendant's counsel asked plaintiff's witness Oliver whether he had on May 9th made any

arrangements whatever with that bank for the guaranteeing of the payment of the cattle tendered on that day. This question was excluded (pp. 90, 177). It is to be remembered that the cattle was to be delivered at Nogales, across the border, on the 10th, that is to say, the following day (p. 34). This question evidently, therefore, tended to prove whether or not the plaintiff was ready and willing to perform the conditions of the contract and it was error to exclude it.

The general question was raised by Defendant's Written Request to Charge No. 3, which the learned Court refused to give and the charge without sufficient modification of Plaintiff's Written Request No. 7 (pp. 109, 114, 321, 332, 346). Moreover, the Court's charge to the jury contained repeated statements that if the cattle tendered by the defendant were not according to the contract then the plaintiff was entitled to a verdict, regardless of whether the plaintiff was able to or did furnish cars to receive the cattle and whether the guarantee of payment in a manner satisfactory to the bank had been arranged for. The learned Court emphasized and re-emphasized this instruction (pp. 116-121, 334, 336, 337, 341, 342, 348-352). We submit that this was prejudicial error, especially in view of the refusal to charge Defendant's Supplemental Request No. 7, as follows (pp. 113, 325):

"I further charge you that, even if you find that the cattle tendered to plaintiff, on May 9th or May 12th,

or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant.”

This refusal and the charge as given effectively took away all question of readiness, willingness and ability to perform the contract on the part of plaintiff from the jury. This was clearly error.

Goodrich vs. Sweeny, 36 N. Y. Super. Ct. 320,
325.

Iroquois Furnace Co. vs. Bignall H. Co., 201
Ill. 297.

We submit that even though the defendant had been guilty of a breach of the contract, yet the plaintiff was bound to show that he had performed, or was ready and able to perform the conditions the contract placed upon him up to the time of the breach. Such proof is a condition precedent to recovery.

Porter vs. Rose, 12 Johns (N. Y.) 208.

Bronson vs. Wiman, 8 N. Y. 182, 188.

Woolner vs. Hill, 93 N. Y. 576, 680.

Hess Co. vs. Dawson, 149 Ill. 138.

Russell vs. Excelsior S & M Co., 120 Ill. App. 23.

Neis vs. Yocum, 16 Fed. 168.

Reid vs. American Co., 136 N. Y. Suppl. 75.

Faber vs. Hougham, 36 Oregon 428.

Kellogg vs. Nelson, 5 Wis. 125.

Cook vs. Ferral, 13 Wend. 285, 287.

Cole vs. Hester, 31 North Car. 23, 26.

So far from showing such readiness, ability and willingness on his part on the 12th of May, 1913, the plaintiff had cancelled an order for 32 cars on May 9th, 1913, which he had ordered from the railway to ship the cattle in (pp. 43, 300). This put it out of his power to have the cars ready by the 12th if the cattle proved within the contract (pp. 300-304).

Moreover, the plaintiff Hall had made no arrangements whatever with the bank at Nogales relative to guaranteeing the payment of the cattle (pp. 144, 178). In view of the fact that this had to be done before the cattle crossed the line, it is obvious that there should have been some evidence adduced on this subject by the plaintiff.

The insufficiency of the evidence on this subject was raised by Error XVII and paragraph III of the Petition for a New Trial (pp. 67, 107). There it was pointed out that the plaintiff Hall himself testified that his only ability to perform his part of the contract after May 9th and before May 12th, 1913, lay in the sale of this cattle to Clay, Robinson & Co., through their representative, Johnston. As Johnston refused to accept the cattle on May 9th, it follows that on May 12th the plaintiff was not ready, willing and able to perform his part of the contract (pp. 142, 144-145, 155-156).

It should not be forgotten, moreover, that the contract between Hall and Clay, Robinson & Co., while providing for an advanced price, did not mention any grade (p. 41). Johnston's refusal to accept the cattle, therefore, had no bearing on the contract between the parties to this action.

Proof of readiness and willingness to perform a contract is part of the plaintiff's burden and it is not shifted by defendant's allegation of a want of performance.

Iroquois Furnace Co. vs. Bynill Hard. Co., 201 Ill. 297, 66 N. E. 237.

Eppens, etc., Co. vs. Littlejohn, 27 App. Div. 22, 50 N. Y. Supp. 251, Affd. 164 N. Y. 187, 58 N. E. 19.

Cummings vs. Tilton, 44 Ill. 172.

Duryea vs. Rayner, 46 N. Y. Supp. 437.
437.

In *Simmons vs. Green*, 35 Ohio St. 104, it is held that before a plaintiff can recover damages for non-delivery of goods he must prove that he was ready and willing to receive and pay for them as delivered.

III.

THE LEARNED COURT ERRONEOUSLY CONSTRUED THE CONTRACT TO PERMIT THE PLAINTIFF TO REFUSE THE TENDERED HERD OF CATTLE, EVEN THOUGH THERE

WAS A FULL TRAIN LOAD OF CONTRACT CATTLE THERE AND ONLY A FEW UNMERCHANTABLE CATTLE.

This question was raised in the first place by plaintiff's objection to the testimony of Mr. Johnston that he saw some unmerchantable cattle, sore-footed cattle and swaybacks and quite a number of runts and stags in the herd tendered on May 9, 1913 (Error VIII, pp. 92, 188). The Court admitted this testimony, thereby construing the contract to require the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all; for otherwise, obviously this testimony would have been immaterial.

This construction of the contract was emphasized by the Court in refusing to give Defendant's Written Supplemental Request No. 1, and in his charge to the jury (Errors XXIV and XXX, pp. ~~111~~ 114, 323, 333, 335, 346, 347).

The Court's charge on this subject was as follows (p. 333):

"You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train load lot of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine, inspect or cut from the herd

of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, swaybacks, blinds, cattle too thin to ship, unmerchantable cattle, cattle under two year old, all cattle not of the grade as good or better than Terrasas cattle."

This charge was substantially repeated and re-emphasized by the Court (pp. 335, 347).

We submit that this construction is an unfair interpretation of the contract. A contract must be construed fairly to both sides. A contract will not be construed so as to give one party an unfair or unreasonable advantage over the other unless such was the manifest intention of the parties at the time it was made. Such reasonable construction as will make it effective according to the intention of the parties will be adopted. A contract must be construed as reasonably as its terms will allow.

Irwin vs. Kilburn, 3 N. E. 650, 104 Ind. 113.

Allemong vs. Augusta Ntl. Bank, 103 Va. 243,
48 S. E. 897.

Blitz vs. Union Steamboat Co., 17 N. W. 55, 51
Mich. 558.

Harz vs. Peterson, 80 Ill. App. 21.

We submit that the learned Court's construction of the contract gave the plaintiff an unconscionable advantage over the defendant not contemplated by the parties. Hall, according to this construction, could have refused these cattle even though a mere handful out of the 1300 cattle tendered were not within the terms of the contract. Taking the contract as a whole, its very provisions refute this construction. The clause allowing the plaintiff a fifteen (15%) per cent cut after all unmerchantable cattle had been cut out by the plaintiff shows clearly that the contract was one for the choosing of a train load out of a herd tendered.

As was shown above, the Company had made a bona fide effort to cut out all unmerchantable cattle and cattle not within the contract. What is unmerchantable or not, or what is of the grade of the Terrasas cattle or not, is obviously often a matter of opinion. The Court's harsh construction would have charged the Company with a breach of contract because there remained in the herd a few cattle which, in the opinion of Hall or of the jury, were swaybacks, runts, stags, blinds, lump-jaws, cattle too thin to ship, sore-footed cattle, or cattle below the Terrasas grade, even though the Company's agents considered them in good faith within that grade, and even though a full train load of cattle indisputably within the contract remained in the herd and were offered to the buyer in fulfillment of the contract. Ob-

viously the fifteen (15%) per cent cut clause was inserted to assure the buyer that all cattle to that extent which he might consider undesirable would be excluded. This clause is excellent proof that both parties considered this question a matter of opinion and, therefore, contemplated the probability of there being cattle at the time of tender in the herd which the buyer might not consider within the contract. The subject matter of the contract should also be considered in this connection.

The extreme rigor of the Court's construction appears clearly from the proof. We have seen that Hall took the position that he did not have to cut a train load lot from the herd, his mere statement that there were too many non-contract cattle in the herd appearing to him to be sufficient without any attempt to test its truth by cutting the cattle or making a close examination. All the evidence adduced by the plaintiff on this point was general in the extreme. It amounted to general statements that there was a large number of non-contract cattle in the tendered herds. No attempt whatever was made to cut out such cattle. The arbitrariness of this position is particularly evident in regard to the alleged short ages. The only really reliable test of the age of a steer is the examination of the teeth (p. 205). Plaintiff and his witnesses, however, contented themselves with sweeping statements. The fact that the plaintiff had to satisfy Mr. Johnston under a contract with terms differing from those of the Myers-Company contract must be considered.

We submit that if the plaintiff could have cut a train load of contract cattle from the herd the existence of some non-contract cattle in the herd would not have *ipso facto* breached the contract under a fair construction.

IV.

THE LEARNED COURT MADE NUMEROUS ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE, AND IN REFUSING TO CHARGE AS REQUESTED.

A. EVIDENCE OF AN ADMISSION BY PLAINTIFF.

The Company's counsel asked Mr. Hall whether he had not stated to Mr. Myers at El Paso in June, 1913, that he and Mr. Oliver had made a mistake in rejecting the cattle. The Court sustained plaintiff's objection to this question (Error III, pp. 87, 153).

An admission of this kind is particularly important where there is a conflict of evidence.

Union Mut. L. Ins. Co. vs. Masten, 3 Fed. 881.

The Court's ruling was clearly erroneous. In *St. John vs. Leyden*, 111 Ga. 152, 158, the action was for breach of warranty of title to land. It was held that evidence of an admission by the defendant that he had made a mistake as to one boundary line is admissible.

Snow vs. Paine, 114 Mass. 520.

Linnehan vs. Sampson, 126 Mass. 506.

In re Thompson, 197 Fed. 681.

B. IRRELEVANT TESTIMONY.

The Court allowed the plaintiff to testify that the contract between him and Clay, Robinson & Co. was not cancelled and that he furnished other cattle to that company under that contract (Error IV, pp. 87-98, 157). This evidence was clearly immaterial to the issues, and not binding on the defendant as it relates to transactions and statements between other parties.

C. HYPOTHETICAL ANSWER OF WITNESS.

Plaintiff's witness Oliver answered a question as to whether he cancelled the order for cars before or after his trip to Mexico as follows: "If I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled them afterwards, it was after I saw the cattle." The defendant objected to this answer but his objection was overruled (Error V, pp. 89, 164-165). This was clearly error.

Pilcher vs. United States, 113 Fed. 248, 251.

McFarlane vs. Howell, 16 Tex. Civ. App. 246,
250.

D. IMPROPER EVIDENCE AS TO SAMPLES.

In reply to the following question put to him by plaintiff's counsel, "What proportion of the cattle in that

herd were below the grade of Terrasas cattle?" plaintiff's witness Johnston said, "There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip." The Court overruled defendant's motion to strike out this answer (Error VII, pp. 91, 187). This was error. The answer was irresponsible and, moreover, the only proper test of performance was that set forth in the contract.

E. ERRONEOUS ADMISSION OF EVIDENCE AS TO REASON FOR AN ALLEGED FACT.

The Court refused defendant's motion to strike out the testimony of plaintiff's witness Johnston as to the reasons given by Mr. Elias for not being able to obtain certain brands of cattle. This, we submit, was error (Error IX, pp. 93, 189). The alleged reasons given by Mr. Elias were wholly immaterial to the issues.

F. ERRONEOUS EXCLUSION OF EVIDENCE RELATING TO MR. MYERS.

The defendant's counsel asked defendant's witness Elias concerning what was said by Mr. Oliver as to what Mr. Myers was going to do if he was present at the tender of the cattle. This question was objected to by the plaintiff, and the objection was sustained by the Court (Error XIII, pp. 102, 257-259). The contract between Hall and Myers provided that Myers or Tankersley, his agents, "shall be on the ground at the time

of delivery of all cattle, and aid and assist in receiving said cattle." This evidently constituted the one of them who was present at the tender of the cattle the agent of Hall in receiving the cattle. It was relevant, therefore, to show just what the degree of relationship between Mr. Hall and Messrs. Myers and Tankersley was.

Again plaintiff objected to any conversation had by Elias with Myers in the presence of the plaintiff. The Court sustained this objection (Error XIV, pp. 103, 262-264).

We have seen that the contract between them constituted Myers the agent of Hall for the purpose of receiving the cattle. Anything Myers may have said as to the cattle, particularly in the presence of Hall would, therefore, be binding on the latter.

Moreover, this contract shows that as between Hall and Myers the latter retained an interest in the contract, as he was to be paid three (\$3) dollars and four (\$4) per head for each of the steers delivered. The exclusion of conversations between Elias and Myers in the presence of Hall was, therefore, clearly error.

Caldwell vs. Auger, 4 Minn. 217.

Crippen vs. Graham, 88 North Car. 214.

Charleston Live Stock Co. vs. Collins, 79 South Car. 383.

G. ERRONEOUS ADMISSION OF EVIDENCE
AS TO CUSTOM.

The learned Court overruled defendant's objection to questions propounded by plaintiff to defendant's witness Joffroy on cross-examination as to the custom of cancelling orders for cars (Error XV, pp. 105, 305-306). This evidence of custom was clearly immaterial and incompetent, as the issue was what Mr. Hall had done in reference to this particular matter. As he had put it out of his power to supply cars in time for the delivery, the existence of a custom, even if competently established, could not save him. The immateriality of this evidence is particularly clear when it is considered that the custom claimed was simply the general one of canceling orders for cars to save demurrage and not one that had any relation to the circumstances of this case.

Moreover, the mere evidence by one witness that there existed at Nogales such a custom was wholly insufficient to establish its existence. This evidence was immaterial as it was not shown that the custom was uniform, certain or known to the Company.

Chicago, M. & St. P. Ry. Co. vs. Lindeman, 143
Fed. 946.

Continental Coal Co. vs. Birdsall, 108 Fed. 882.

Chilberg vs. Lung, 128 Fed. 899.

Great Western Elev. Co. vs. White, 118 Fed. 406.

H. REFUSAL TO CHARGE DEFENDANT'S
WRITTEN SUPPLEMENTAL REQUEST NO. 4
WAS ERROR.

The defendant requested the Court to charge that: "A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram dated May 14th." This request the Court refused (Error XXVII, pp. 112, 324). We submit this refusal was error. The construction authorized by the learned Court would place an unconscionable burden on the defendant, and is not as reasonable or as obviously called for by the terms of the contract as the one expressed in the above request.

Irwin vs. Kilburn, 3 N. E. 650, 104 Ind. 113.

Allemong vs. Augusta Ntl. Bank, 103 Va. 243,
48 S. E. 897.

Harz vs. Peterson, 80 Ill. App. 21.

It is, we submit, a breach of contract to exercise it under an arbitrary and unreasonable construction.

• Blitz vs. Union Steamboat Co., 17 N. W. 55, 51
Mich. 558.

I. ERRONEOUS ADMISSION OF EVIDENCE AS TO COMPROMISE CONTRACT.

Plaintiff's counsel asked plaintiff if the Company had delivered any cattle to him pursuant to the compromise contract testified to by plaintiff. The defendant's objection to this question was overruled (Error X, pp.

94, 209-211). This ruling was clearly error. What was done or not done pursuant to the compromise contract, was not relevant to the issue as set forth in the pleadings, in which there is no mention of such a contract.

Jordan vs. Fenno, 13 Ark. 593.

Frenchwanger vs. Manitawoc M. Co., 187 Fed. 713.

In Owl Creek Coal Co. vs. Goler, 210 Fed. 209, Judge Van Valkenburgh said at page 216:

“Where it clearly appears from the record that the evidence offered and excluded was competent and of such materiality and weight that its exclusion might have caused injury to the party offering the same, nothing further or more formal is required.”

The same rule applies to the erroneous admission of evidence. We submit, therefore, that because of these numerous errors in the admission and exclusion of evidence alone, the judgment should be reversed.

V.

THE LEARNED COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE GROUND OF A VARIANCE BETWEEN THE PROOF AND THE PLEADING ON THE PART OF PLAINTIFF.

The plaintiff testified that after the cattle was ten-

dered to him on May 12, 1913, he offered the Company that if it would deliver to him a thousand four-year old steers in the fall at thirty-two (\$32) dollars a head, crediting the ten thousand (\$10,000) dollars already paid on the new deal, he would call off the contract sued upon. This compromise offer the plaintiff alleged that the Company accepted (pp. 137, 151, 153, 209-210).

At the close of plaintiff's case the defendant moved for a directed verdict in its favor, and renewed the motion at the close of all the evidence upon the ground that the plaintiff's evidence showed that prior to the commencement of the suit and about May 12, 1913, the defendant had entered into a valid contract with the plaintiff with the purpose of compromising the then existing dispute between them with reference to the contract sued upon because such proof constituted a fatal variance with the pleadings, and because the plaintiff had proved a cause of action not alleged in the complaint. These motions the Court denied (Error XVIII, pp. 108, 212, 319).

We earnestly submit that the evidence of the plaintiff below showed that the contract sued upon had been superseded, modified and changed into an entirely different contract from the one alleged to the complaint. This, we submit, constituted a fatal variance.

Blake vs. Crowninshield, 9 N. H. 304.

Harrison vs. Kansas City C. & S. Ry. Co., 50 Mo. App. 332, 336.

Nerbitt vs. McGehee, 26 Ala. 748.

Central Tr. Co. vs. Colorado Light & P. Co., 200
Fed. 85, 88.

VI.

THE MOTION FOR A NEW TRIAL SHOULD
HAVE BEEN GRANTED.

The defendant moved for a new trial for all the reasons set forth above. This motion was denied (Error XXXII, pp. 60-79, 121). This was error. We submit that, because of the extremely prejudicial errors set forth above, a new trial will be granted. .

Respectfully submitted,

FRANK J. BARRY,
WILLIAM M. SEABURY,
Attorneys for Plaintiff in Error.
With whom was John deR.
Storey on the Brief.

Dated San Francisco,
October 15, 1914.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALAMO CATTLE COMPANY,

Sociedad Anonima,

Plaintiff in Error,

vs.

JOHN G. HALL,

Defendant in Error,

} BRIEF FOR
Defendant in Error.
No. 2451

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Attorneys for Defendant in Error.

Dated San Francisco, California,

October 15, 1914.

Filed

OCT 9 - 1914

F. D. Monckton,

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STATEMENT OF THE CASE.

On January 19, 1914, the defendant in error, hereinafter called the plaintiff, filed a suit in the district Court of the United States in and for the District of Arizona against the Alamo Cattle Company, Sociedad Anonima, hereinafter called the defendant, based upon a certain contract for the sale of four or five thousand two year old steers and one thousand head of four year old steers at the price therein stated, which steers were to be as good or better than the Terrasas cattle, and were to be delivered in trainload lots, upon which contract the defendant received Ten Thousand (\$10,000.00) Dollars in United States currency. The contract, among other things, provided "the seller hereby acknowledges receipt of (Ten Thousand) Dollars U. S. Cy. in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and

failing to do so he shall forfeit the amount or amounts advanced on this contract. The seller agrees to pay two dollars, in addition to returning the forfeit, on each head he fails to deliver under this contract, which shall constitute entire claim for damages." The contract contained a further provision as follows, (p. 10) ; "The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent of said cattle after all runts, stags, (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle *have been cut out by the seller*". Plaintiff alleged in the complaint that defendant failed, neglected and refused to deliver to plaintiff the cattle in the numbers and of the grade, brand, kind and character required by it to be delivered under the terms of the contract in this; that the cattle tendered for delivery were not cattle tendered in train-load lots as good or better than the Terrasas cattle, or of the grade, kind, character, brand or numbers required under the terms of the said contract to be delivered in train-load lots at Nogales in the State of Arizona, and asked for judgment for the return of the \$10,000.00 previously paid on the contract and for the further sum of \$2.00 a head on Five Thousand head as liquidated damages, as provided in the contract, or the sum of \$20,000.00 with interest and costs.

On April 23, 1914, the defendant filed its amended answer in which it admits receipt of \$10,000.00 and admits the plaintiff was assignee of the contract and had a right to sue thereon, and for separate defense it set up affirmatively the execution of the contract sued upon; that they were ready, willing and able to comply with the terms and

conditions of the said contract by it performed, and did duly and fully comply with and perform said terms and conditions until plaintiff refused and failed to perform as therein more fully set out, etc.; that in the early part of April, 1913, defendant duly tendered to plaintiff and his duly authorized representative one thousand head of cattle of the kind and quality which defendant agreed to furnish by said contract; that on May 9, 1913, defendant tendered to plaintiff and his duly authorized representatives from one thousand *twelve* hundred to one thousand five hundred head of cattle, of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract, and on May 13, defendant tendered one thousand ninety-three cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract; but plaintiff without right or authority broke and failed to perform his part of the contract, and refused to select and accept any of said cattle, although the said cattle in every respect fulfilled each and all terms and conditions of said contract relating thereto, etc., and further alleges that the amount of damages which defendant might and could sustain by reason of the breach of the contract on the part of plaintiff are uncertain in amount and that the \$10,000.00 mentioned in said contract was and is reasonable and a usual sum fixed upon and paid to defendant as liquidated damages for the breach of the contract upon the part of the plaintiff.

Defendant further sets up a cross-action against the plaintiff, alleging damages in the sum of \$17,300.00 for breach of said contract, upon which the defendant re-

ceived \$10,000.00, and asks judgment for the balance of \$7,300.00 together with interest thereon. Plaintiff filed merely a formal denial to the counter-claim and cross-complaint of the defendant.

The case was called for hearing in Tucson on May 20, 1914; a jury selected and both parties went to trial upon the merits of the case. At the close of the evidence, the argument and the instructions of the court, the jury retired and returned a verdict of \$21,225.00 in favor of the plaintiff. From this judgment the defendant sued out a writ of error in this court, and has alleged thirty-two errors, of which it complains, but which have been grouped in brief under six points, which we will answer in the order raised.

POINT NO. ONE.

The burden of proof was not upon the defendant to show the cattle tendered on May 9th and 12th, 1913 fully complied with the contract in every respect.

STATEMENT.

The Court instructed the jury (p. 332) :

“You are instructed that the burden of proof is upon the Alamo Cattle Company *BEFORE THEY CAN RECOVER JUDGMENT AGAINST PLAINTIFF* to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect.”

which was objected to (p 345) “because the burden of proof was upon the plaintiff to show a breach of the contract by the defendant.”

The Court further instructed the jury (p. 332) :

“As I will presently charge you, if you find for the defendant, your verdict will mean that the defendant is entitled to retain the \$10,000.00 already paid it, but no other sum or sums whatever.”

And (p. 343).

“On the other hand if you believe from the testimony that the defendant, the Alamo Cattle Company, on or about said time above mentioned, tendered to the plaintiff Hall a train-load of cattle, and further believe that same were in the numbers and of the ages, brands, grades and quality required by the contract, and that the cattle were tendered in full compliance with the terms of the contract, and that plaintiff Hall declined to receive them or accept them, and did not accept then, then the defendant, the Alamo Cattle Company, was justified in writing the letter dated May 13, 1913, declaring the contract forfeited and at an end.”

“The jury are instructed that the burden is upon the plaintiff and it is for him to prove every material allegation of his complaint by a preponderance of the evidence, if upon any one or more of the material allegations of the plaintiff's complaint the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant. By preponderance of the evidence is meant the weight of evidence; that which on the whole when fully, fairly and impartially considered by the jury produces the stronger impression upon the mind of the jury and is more con-

vincing as to its truth when weighed against the evidence in opposition thereto.”

And (p. 337)

“If you find that defendant tendered and offered to the plaintiff the cattle called for in the contract in the quantity and of the ages specified in the contract, and that such cattle were as good or better then Terrasas cattle, then the verdict must be for defendant.”

“If you believe that the cattle tendered to plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff’s part, which relieved the defendant of any further duty to be performed on its part, and justified the defendant, Alamo Cattle Company, in writing the letter dated May 13, 1913, declaring that plaintiff’s right in the contract forfeited.”

Defendant plead, (p. 20) :

“That at all times during the months of April and May, 1913, as required by the terms of said contract between defendant and the said E. W. Myers, dated January 16, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract to be by it performed, and did duly and fully comply with and perform said terms and conditions on its part until the plaintiff refused and failed to perform the terms and conditions of said contract on his part to be performed, as hereinafter more fully set forth.”

That they did in the early part of April, 1913, and on

May 9th and May 13th, tender to plaintiff cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract, but plaintiff without any right or authority broke and failed to perform his part of said contract and refused to select and accept any of the said cattle as offered and tendered, although said cattle in every respect fulfilled each and all the terms and conditions of said contract relating thereto.

PROPOSITION A.

Where defendant sets up a cross-action or counter-claim, it has the affirmative and assumes the consequent burden of proving the facts upon which it is based.

Brockman Com. Co. v. Kilbourne, 86 S. W. 275,
111 Mo. App. 542;

Lilienthal v. U. S. 97 U. S. 237.

Kelley v. Springfield Road Roller Co., 72 S. E.
749;

Highsmith Bros. v. Hammonds, 138 S. W. 635.

DISCUSSION.

It should be noted that the instruction complained of merely had to do with the affirmative relief that the defendant asked for, and upon which question the court was quite proper in giving the instruction requested.

PROPOSITION B.

It is a general rule that the seller of goods has the burden of proving, before he can recover, that the goods sold or attempted to be delivered complied with the sample or the contract, especially where he asks affirmative relief.

Brockman Com. Co. v. Kilbourne, 86 S. W. 275;
 Bauer Cooperage Co. v. Tartar, 139 S. W. 947;
 Pope v. Filley, 9 Fed., 65;
 McCall Co. v. Jacobson, 102 N. W. 969, 139
 Mich, 453.

DISCUSSION.

Under the pleadings the plaintiff (p. 7) alleged that defendant failed and refused to deliver cattle in the numbers and of the grade, brand, kind and character, required by contract, and those tendered were not contract cattle, and the defendant (p. 20) alleged they tendered on the different dates cattle of the kind and quality which defendant agreed to furnish and sell under contract and plaintiff refused to accept them although they complied with all the terms and conditions of the contract,—plaintiff having asserted the negative of this proposition, the defendant the affirmative, and under the pleadings it was as essential for the defendant to prove that they complied with the contract, so as to get the affirmative judgment for which they prayed, as it was for the plaintiff to prove the negative of the fact, and has often been stated where one party assumes the burden of proving a negative allegation, and the other by his pleadings assumes the burden of the affirmative of that same allegation, only sufficient proof to make out a prima facie case is necessary to throw the burden of the evidence upon the one asserting the affirmative of that allegation, and we do not deny that we had to prove a prima facie case and there was ample evidence presented to the jury, as shown by the record, to sustain the verdict of the jury, and the examina-

tion of the evidence will clearly show that it preponderates in favor of the defendant in error. It should be noted that one of the principal elements was the warranty on the part of the defendant that the cattle that they would deliver would be as good or better than Terrasas cattle, and the evidence all went to that question, and an examination of the record will show that the plaintiff maintained by all of his witnesses the burden of proving that the cattle were not contract cattle and introduced a number of witnesses, who qualified, and all testified the cattle were not contract cattle. An examination of the testimony set out in brief of Plaintiff in Error shows we easily maintained our burden, even though there has been omitted some of the best corroborated facts, as Ben Sneed (defendant's witness) said (p. 299): "The general grade of Terrasas cattle show a predominant red color, almost all of them"; Ramon Elias (Manager of defendant) said (p: 266): "He (Hall) went out and cut out about twenty-five of the white-face, red and best colored steers to one side, and he said 'that's the cattle I want' and I said to Mr. Hall 'there's no use to lose any more time, that's not the cattle I offered, and we'll just let it go until we see Mr. Kibbey.'" These are practically the same words Mr. Hall used (p. 137), so we must assume those facts are true, and in addition thereto the plaintiff introduced ample affirmative evidence to prove the negative allegation, and did not attempt to shirk the burden, so as a matter of fact we feel there should be no complaint on quantity of evidence to sustain, and, as a matter of law, the court was correct in making defendant, when they of their own accord asserted the affirmative, carry some burden, for no court will say it is necessary for

us to disprove the affirmative allegations of the opposite party by a preponderance of testimony.

PROPOSITION C.

This contract may have been breached either by the defendant not delivering contract cattle on May 9th and 13th, and by writing the letter dated May 13, 1913, as follows, (p. 38, Plaintiff's Exhibit K.) :

"Alamo Cattle Co., S. A. Magdalent, Sonora, Mexico, Box 24. Hacienda El Alamo, Nogales, Ariz., May 13, 1913.

Mr. J. G. Hall, El Paso, Texas.

DEAR SIR:

Referring to the contract between ourselves and Mr. E. W. Meyers, dated Jan. 16th, 1913, and transferred to you by him on Feb. 4th, for 4,000 two year old steers and 1,000 four year old steers, to be delivered during April and May, 1913, in train-load lots, beg to advise you that owing to the fact that a herd of two year old steers was tendered you on May 12th consisting of 1,093 steers from which we asked you to cut a train-load, but which you refused to cut or receive, after having come down expressly to receive these cattle, after due notice according to contract, we consider that you have forfeited all rights in the aforesaid contract, and hereby so advise you.

Very respectfully yours,

Alamo Cattle Company, S. A.

By W. Beckford Kibbey, Jr., Pres."

Plaintiff wired Exhibit L. as follows (p: 39) :

“Western Union Telegraph Company,

El Paso, Texas, May 14, 1913.

Alamo Cattle Co.

Care First National Bank,

Nogales, Ariz.

I am ready and willing to receive and hereby demand all cattle coming within contract of January sixteenth with Myers which contract was transferred to me. Delivery to be made between May twenty-ninth and June first, nineteen thirteen in train lots. Advise when you want cattle cut.

Chg. J. G. Hall, 3:40 p. m.

J. G. HALL.”

So it is very evident that the plaintiff was still demanding the cattle under the contract when the defendant itself breached the contract, and either of these breaches are sufficient, if the jury was satisfied that the evidence in the first case favored the plaintiff, the second breach committed by virtue of the letter (Exhibit K.) was sufficient breach to be relied upon, and either of the breaches would have been sufficient upon which to base the verdict, and it may be that the jury considered by virtue of the conflict of testimony that both were at fault on May 13th in regard to quality and quantity of cattle under above letter (Exhibit K.) and telegram (Exhibit L.) they were warranted in their verdict, and we do not agree that the only breach that could occur was the one on May 13th, and do not think the letter (Exhibit K.) is by virtue of its evident cancellation of the contract by defendant of no effect either with this Honorable Court or with the jury and they should not be relegated to second place by the

Plaintiff in Error. In this connection it should be remembered that it became necessary for plaintiff to hold himself ready to receive the cattle under the contract at any time up to June 1st, and he so demanded delivery and was not at fault. Therefore, the only party who could be relieved by a breach on May 13th is the Alamo Cattle Company, if the breach would have been committed by Hall on that day; but if on the other hand the cattle tendered were not contract cattle, the defendant could have delivered contract cattle up to June 1st, had they not broken the contract by their letter of May 13th.

The case of *San Francisco C. Agency v. Wideman*, (124 Pac. 1056) cited in brief, is not applicable to our case, as in that case the defendant only plead the general issue and did not ask for affirmative relief, as was done by defendant, and the court said "the evidence was more than sufficient to warrant the conclusion that defendant was at all times ready, able and willing, to make delivery"; and even under the statement of facts, as set out in the brief of Plaintiff in Error, we submit that plaintiff in error is a long way from the position occupied by the defendant in the case cited.

And none of the cases cited on page 20, of the brief, apply, as all but the following went to trial on a general denial, and necessarily compelled plaintiff to prove the essential facts alleged.

The case of *Sharp v. State* (99 N. E., 1072) was a suit on surety bond; defendant plead general denial and payment,—same facts not alleged in both plead-

ings, nor did both ask affirmative money judgment. Wigmore on Evidence, (p. 3524, Sec. 2486) from which the citation is taken, further states: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different cases."

In the cases cited in Brief (p. 23) there were none of them arose where plaintiff asserted the negative facts and asked for a money judgment and the defendant pleaded the same facts affirmatively and asked for a money judgment.

In *Balmford v. Grand Lodge* both pleaded the same facts negatively and the plaintiff put in no proof. The question of burden of proof did not arise. The question arose as to whether or not it was necessary to make any, and the court said it was. Plaintiff in Error admits we put in lots of evidence, and hence this case does not apply.

In *Fox v. Held*, there was no affirmative allegation by defendant of facts plead negatively by plaintiff, and hence is not parallel.

In both *Botto v. Vandament* and *Amador County v. Butterfield*, judgment was rendered on pleadings when a general denial was filed, and these cases went off on this question, and are not parallel.

On the other hand the cases of *Brockman Company v. Kilbourne* (86 S. W., 275) we feel is directly in point and controlling.

The case of *Cole v. Carter* (22 Tex. Civ. App. 456; 34 S. W. 914) is a case that was reversed especially on ac-

count of the fact the instructions were not broad enough as to the proof of false representations. There was no question in the case as to placing the burden of proof as charged in this appeal, and it is therefore not applicable. Therefore, we say that the court did not err in refusing to give the instruction complained of in Point No. 1.

POINT NO. 2.

The court erred in admitting and excluding evidence and in its instruction to the jury with regard to the question of readiness, willingness and ability on the part of the plaintiff to perform the contract and in its refusal of a new trial because of failure of proof on that subject.

STATEMENT.

All the errors grouped under this point resolve themselves into the one proposition as to the weight of plaintiff's evidence of his ability, readiness and willingness to perform his contract. There was no direct evidence tending to prove he was not able, ready and willing to perform his contract, and counsel for defense on cross-examination brought out sufficient evidence to warrent the court in charging that fact to have been proven had he so desired. Without objection, Mr. Hall testified (p. 142) "I was prepared and ready to receive any pay for all cattle that they could deliver to me under the contract," and went on further to explain his arrangements for payment. On cross-examination (p. 146) Mr. Hall also testified, "I was ready and willing to take the cattle under the contract up to June 1st—that is the limit of the contract."

The theories of the defendant and plaintiff do not

agree as to who has the first move under the contract and an examination of the contract shows the following facts should be taken in their chronological order :

First: Plaintiff should give defendant fifteen days notice for each delivery in train-load lots. This was given as shown by Exhibit C., dated April 25, 1913, and Exhibit D., dated April 28, 1913; and also by telegram dated May 14, 1913, (Exhibit L.), but this provision is for the benefit of defendant and he may waive it.

Second: The seller (defendant) must cut out all runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle from a herd of cattle of full ages, and that are as good or better than Terrasas cattle.

Third: The plaintiff had the privilege of cutting out and rejecting fifteen per cent of the cattle when tendered as agreed, which must be done at Moraga or Distilidera. This was a provision for the benefit of Mr. Hall, and he could have waived it had he so desired.

Fourth: They must be brought to the International line.

Fifth: Plaintiff must guarantee payment in a manner satisfactory to the First National Bank of Nogales, Arizona, before they cross the line.

Sixth: Cattle are to be loaded on board cars.

Seventh: Then plaintiff agreed to pay the balance of the purchase money, and if he fails to pay the balance, he forfeits the amount advanced on the contract.

PROPOSITION A.

The Federal Court has the right to comment on the weight of the evidence.

STATEMENT

This entire point resolves itself into whether or not the Court has that right, and we feel the right is so well settled, it needs no comment or authorities.

PROPOSITION B.

The Court fully covered all requirements of placing upon plaintiff the duty to show he was ready, able and willing,—instructed the jury (pp 333-334)

“You are instructed if you find from the evidence and believe that plaintiff was ready and willing and able to receive and pay for all cattle, in the numbers, of the ages, brands and quality required under the terms of the contract sued upon, and if you further find from the evidence and believe that the defendant failed in any respect to comply with the terms of said contract (provided you further find that such non-compliance on the part of the defendant was not occasioned by the act of the plaintiff), you should find a verdict for the plaintiff in the full sum of \$20,000.00 as prayed for in plaintiff’s complaint.”

STATEMENT.

((See general statement under point No. 2).

The Court also instructed (pp 334-335) :

“You are instructed that no duty developed upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide cars for transporta-

tion and pay to the defendant the contract price per head upon delivery of the cattle, free of all duties and expenses on board cars at Nogales, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona."

DISCUSSION.

As shown by the above statement the contract makes the first duty rest upon Mr. Hall to give notice, which he complied with, and it then became the duty of the Company to cut out all runts, unmerchantable cattle, etc., and tender a train-load of cattle of full ages as good or better than Terrasas cattle, and the court instructed the jury (p. 341) :

"In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona."

The entire point covers practically the same issues, and we feel the court's interpretation is correct, and any other would lead to foolish waste of time, for if defendant did tender cattle that fully complied with the contract on May 13th, the plaintiff breached the contract by refusing to accept them, regardless of the fact of his being ready,

able and willing to comply with the contract, and if on the other hand defendant did not tender cattle that complied with the contract, it breached the contract with their letter of March 13, 1913 (Exhibit K., p. 38) regardless of whether plaintiff was ready, able and willing, to receive cattle, that is, of course, unless it should have been shown that the Company refused to comply with the contract on account of the inability of Mr. Hall in this respect.

The cases cited in Brief (p. 26) are not applicable, for in the *Iroquois Furnace v. Bignall H. Co.* (66 N. E. 237),—held Plaintiff cannot recover without proving a prima facie case, that he is ready, willing and able to perform the contract.

The cases of *Porter v. Rose* and *Reid v. American Co.*—plaintiff neglected to prove he was ready, willing and able, and the court held it was necessary. In both of these cases no evidence was presented, but in this case, as we have shown by above statement, we presented sufficient proof of these facts.

In the case of *Russell v. Excelsior S. & M. Co.*, the question of proof of ready, willing and able did not arise, but the court did say, “Defendant in pleading a set-off assumes the position of a plaintiff, and, in order to recover, is required to prove the same facts he would be bound to prove if he had brought an original action on his demand.

The cases cited in Brief on page 28 do not apply to our case, as in the case of the *Iroquois Furnace Company v. Bignall H. Co.*, the court held that it was necessary to make some proof of the fact that plain-

tiff was ready and willing and able in order to recover.

In the case of Eppens etc., Co. v. Littlejohn, it is held that it was necessary for plaintiff to show performance within a reasonable time, and we did show performance and carry our burden so as to comply with this case.

In the case of Cummings v. Tilton, the court held that the instructions given by the trial court were not broad enough, in that it did not place any requirement on the plaintiff to prove his readiness and ability to pay. The instructions only required proof of willingness. The court in our case placed the burden of proving all upon us.

In the case of Duryea v. Raynor, the court placed the burden of proof upon the defendant to prove the allegations of the answer in respect to the counter-claim, but further in the case held that the counter-claim was not supported by proof, and, therefore, was not submitted to the jury, so the instruction given operated to place the burden of plaintiff's case upon the defendant, which is wrong, and in our case the burden was placed upon us, and even counsel for defendant admitted that we put in an abundance of proof on this subject.

POINT NO. 3.

The learned court erroneously construed the contract to permit the plaintiff to refuse the tendered herd of cattle even though there was a full train-load of contract cattle there and only a few unmerchantable cattle.

STATEMENT.

The contract provided (p. 10) :

“The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent of said cattle after *all* runts, stags, (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle have been cut out by the seller.”

PROPOSITION A.

A contract is to be construed most strictly against the one who wrote it.

STATEMENT.

W. Beckford Kibbey, Jr., (President of defendant company) testified on direct-examination (pp. 231-232) by Mr. Seabury:

“Q. Mr. Kibbey I show you Plaintiff’s Exhibit A. and ask you to tell us in whose hand-writing the body of that contract is?

“A. My own. All the hand-writing on that is my hand-writing except the signature of Ed. W. Myers, and except the date.”

AUTHORITIES.

Noonan v. Bradley, 76 U. S. 394;

Taylor v. Union Saw-mill Co., 152 S. W. 150;

Commercial, etc. Co. v. Mo. Com. Co., 148 S. W. 995;

Lyon v. Dailey Copper, etc. Co., 126 Pac., 931.

DISCUSSION.

Counsel for defendant admitted that this was a good rule of law, however, the argument came up on another question. He said (p. 232) : "I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the hand-writing of the defendant would be more strictly construed against the party",—and we cannot help agreeing with his statement of the law.

PROPOSITION B.

Was there a duty resting on defendant to cut out the runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle.

STATEMENT.

(See general statement under point No. 3 for provision of contract).

This is particularly a question of fact, so we will examine some testimony in support of the court's instruction,—Plaintiff Hall testified (p. 145) :

"Probably thirty-five per cent of them were as good as or better than Terrasas cattle. Well, I wont say that they were as good, but they were so nearly as good that I would have accepted them. The balance of the herd consisted of yearlings, stags and bulls, and cattle that were not in condition to ship—sore-footed, poor, looked like they had been on the trail for a week or ten days and were worn out. Under the contract I had the privilege of cutting out fifteen per cent after all of the unmerchantable cattle had been trimmed out

by the sellers. I never exercised that privilege, because the herd was never put up in satisfactory shape, and it was for them to do their work first. The herd was not put in the shape that it should have been in under the contract. I mean that it consisted of forty per cent yearlings—fully forty per cent were yearling steers, which I called Mr. Elias' attention to, and he said, "Very well, we are going to ship them to some one else". I said, "I am not going to trim your herd for you."

K. D. Oliver testified (p. 162) :

"I should say not more than 50 per cent if that many. The rest of them were either short, aged, deformed or runts, or tender-footed, or thin, ill-shapen, or something of that—or not of the grade, not of sufficient quality to be of the same grade. Of the cattle that I inspected at that time I shouldn't say came up over four or five hundred head to the requirements of contract cattle. About eight or ten car-loads. Out of which under the terms of the contract there was still to be a cut of 15 per cent. On that occasion I had a conversation with reference to these unmerchantable cattle with both Mr. Kibbey and Mr. Elias. I told Mr. Elias that the cattle were not contract cattle; that we didn't want to take them; there weren't sufficient numbers and that the herd of cattle wasn't properly tendered. It wasn't in shape for the buyer to cut—to pass on them. They hadn't cleaned up the herds themselves. At first Mr. Elias said he didn't agree with me. Then upon our arguing the matter he said he agreed that they were not contract cattle; that there

were many cattle in there that were not contract cattle. Mr. Kibbey said substantially the same as Mr. Elias at that conversation."

James A. Johnson testified (p. 188) :

"Q. Did you see any unmerchantable cattle in the bunch Mr. Johnson? A. Yes sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes quite a number."

W. B. Kibbey, Jr., testified (p. 225) :

"It is a very difficult thing to say what percentage of a herd comes up to contract without actually cutting the cattle, but in my opinion I should say that at least three-fourths of those cattle come up to the contract."

(p. 241)

"About twenty per cent that were near the trees were lying down. It is my experience that when cattle have been driven for days, that is what happens. I suppose the cattle having been driven for days prior had something to do with their lying down although the cattle had been there for three days. I suppose they wanted to lie down because they wanted to get off their feet. It is quite probable that they wanted to ease their feet a little. They would have to be driven nine or ten miles to Nogales. I said they had been driven three or four days previously. That

doesn't mean that they had been driven three or four days continuously. I do agree with witnesses for the plaintiff that cattle with tender feet could not be shipped, but any cattle that lie down is not the test. If it walks without limping that indicates that his feet are not tender. If he won't get up when you ride around, you ought to make him—ride up to him.” Ramon Elias testified (pp. 280-282-283) :

“Q. Each one of those was a full two year old?

A. I am not supposed to clean up a herd for some body else.

Q. What do you mean by cleaning up a herd?

A. I am not supposed to deliver the other man just a two year old. It is up to him whether it is a two year old or not. If the buyer thinks there are any unmerchantable cattle in the herd, it is his duty to show the seller where he is wrong or right.

There might have been some yearlings in that bunch; I don't claim to say that every one was a full year old—or a full two year old—he had a right to cut them if they were. I don't consider an animal two years old a stag. There might be some stag steers, but I consider a stag a full four year old animal. There may have been some stags in the bunch but I don't consider them stags. There may have been a few that were pretty thin.”

Thomas J. Donohue testified (pp. 292-293-295) :

“When I went to receive them, the herd was, I judge about between 1250 and 1300 cattle in the herd. To the best of my knowledge that included the cattle that I saw on the 8th which were gathered for tender

to Hall. I couldn't tell you exactly how many short ages I cut out. Altogether I cut out about 300 head. I should judge I cut back about 300 unmerchantable, short ages and cattle I didn't care to take on my contract Of those 300 cattle I cut back, they were undesirable cattle in my opinion, undesirable to me, might be blind, might be runt, might be sway-back or for some reason, I cut those cattle back. I'll give you the exact figures. I've got them right here if you will write them down. 22 yearlings that we found in the yards after we got to town."

E. W. Myers testified (pp. 313-314) :

"I think there were a few stags in there. I don't know how many. I don't think there were many in there too thin to ship. There may have been a few. I am not prepared to say that they were all full two years old. I did not see any three's or four's in that herd. I don't think there were cattle over three years old in that particular herd. I think there were some in there that were not full two year old steers at that date."

DISCUSSION.

We challenge the statement in the brief of Plaintiff in Error that "the Company made a bona fide effort to cut out all unmerchantable cattle and cattle not within the contract from the herd", and the testimony of their own witnesses show that there was no attempt to clean up the herd. Mr. Kibbey said (p. 225): "three-fourth of those cattle would come up to contract;" Mr. Elias testified

(p. 281) : “I am not supposed to clean up the herd for some body else.” Mr. Donohue stated (pp. 292-293) : “I cut back about 300 head unmerchantable, short ages and cattle I did not care to take” (of herd of 1250 to 1300; See p. 292). Counsel evidently over-looked that testimony when they made that assertion, and, therefore, we do not think the court erred in interpreting the contract as complained by the Company which we feel is a reasonable construction.

An examination of the cases on page 30 shows that in all of the cases the court has asserted that the contract must be construed as reasonably as its terms will allow, but none of the cases are in point, for in the absence of showing that the contract is unconscionable or fraudulent, the court will construe it according to its evident meaning, and that is all we ask, feeling that we are entitled to this construction.

POINT NO. 4.

The learned Court made numerous errors in the admission and exclusion of evidence, and in refusing to charge.

PROPOSITION A.

Did the court err in sustaining plaintiff's objection as fully set-out in Error III.

STATEMENT.

The objection as raised by Counsel for plaintiff was :
(p. 153).

“We object, if your Honor please, on the ground that it is not proper cross-examination upon any subject upon which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose.”

This admission was covered when E. W. Myers was put on the stand, who testified, without objection (p. 311) :

“And in discussing the case I asked him if he did not think he made a mistake in refusing to cut the cattle, and he said “yes” that he thought he made a mistake in not cutting them.”

And Mr. Hall testified in rebuttal (p. 318) :

“I heard the testimony of Mr. Myers with reference to a conversation in which Mr. Myers stated that I said that I had made a mistake in not cutting the cattle at the time they were offered at the Distilladero Ranch in Mexico. The conversation was this: We were discussing the circumstances as they happened, and I told him that I thought it would have been better if we had gone ahead and cut out of the cattle that there was in the herd all that did comply with the contract because we would have convinced the Alamo Cattle Company beyond a doubt that they did not have a train-load. He said he could not tell about that. He did not know whether they did or did not have a train-load.”

DISCUSSION.

This needs no authorities for the objection made was not to the substance but to the procedure, and is unquestionably good. It was not in proper shape for an impeach-

ing question, and if intended merely as an admission, it was placed before the jury properly when Myers was put on the stand, and also by Mr. Hall in rebuttal, and without cross-examination by Counsel for defendant. We, therefore, say that the Court properly sustained the objection made, and it could not have injured defendant, because it was afterwards given to the jury.

An examination of the cases cited under Proposition A. Point 4, does not disclose any case in which the alleged admissions were afterwards testified to and were placed before the jury, as was done in our case.

PROPOSITION B.

Irrelevant testimony.

STATEMENT.

The objection and testimony is fully set out in Error IV (pp. 87-89, 157 Brief 34).

DISCUSSION.

The object of the testimony was clearly shown to merely develop more fully facts brought out on cross-examination, and therefore proper.

PROPOSITION C.

Hypothetical answer of witness.

STATEMENT.

Answer is set up in brief of Plaintiff in Error (p. 34).

DISCUSSION.

The cases cited in Brief on page 34, under this sub-head, are not applicable to our case.

In the case of *Pilcher v. U. S.*, the court held it was error to allow revenue officer to testify to an admission of defendant, which was made while the revenue officer was within hearing, but concealed, and the defendant being only identified by his voice.

In the case of *McFarlane v. Howell*, the court held that the opinion of the witness was irrelevant and hear-say and also immaterial, but as it was not taken advantage of at the proper time, it could not be objected to.

These cases are unquestionably not applicable to the proposition under which they are cited, for the question objected to is an absolutely immaterial matter and could not prejudice the case either way, and we do not see how it could be objectionable to defendant.

PROPOSITION D.

Improper evidence as to samples.

STATEMENT.

The objectionable answer was (p. 187) :

“There was only about twenty or twenty-five per cent of the cattle that were tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition.”

Objection made by defendant's counsel (p. 187) :

“I move to strike out the last answer of the wit-

ness on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913."

Witness had just testified (p. 186) "The cattle exhibited to me by Mr. Kibbey or Mr. Elias were a good class of cattle and I think a grade better than the average Terrasas cattle". Ramon Elias testified (pp. 254-255) that he showed Mr. Johnson the cattle in April, 1913, pointing out what "we" thought was "a fair sample of the cattle we were to deliver."

DISCUSSION.

We complied with the only objection raised by counsel, as it clearly appears defendant showed Johnson the cattle in April, 1913, and, therefore, the court's ruling was proper.

PROPOSITION E.

Erroneous admission of evidence as to reason for an alleged fact.

STATEMENT.

(p. 189)

"He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them, and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cat-

tle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle the new government would take it away from him, and consequently he couldn't get those cattle".

"MR. SEABURY: I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case."

DISCUSSION.

This is merely an admission by defendant that is presented, which in Proposition K., defendant objects to (the reverse of the proposition) and says it is error not to allow evidence of an admission by plaintiff. The only objection made is that it was immaterial, but an examination of the question and answer clearly shows its materiality and no other objection was made to it.

PROPOSITION F.

Erroneous exclusion of evidence relating to Mr. Myers.

STATEMENT.

Question objected to in Error XIII was (pp. 102, 258) :

"Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?"

The contract between plaintiff and Myers (Exhibit B. pp 11-12) provided:

“It is also mutually understood and agreed that the said Ed. W. Myers or E. M. Tankersly, his agent, shall be on the ground at the time of delivery of all cattle and aid and assist the said J. G. Hall, his agents or assigns, in receiving said cattle.”

DISCUSSION.

Both of the errors complained of above are the result of a misconstruction of Exhibit B., for it does not provide, nor was it intended to provide that Myers and Tankersly are to be agents of Hall for they have no identical interests and could not act for him, but the contract clearly provides that “Myers or Tankersly, his (Myers’) agent shall be on the ground—and assist Hall”. With the proper interpretation of this contract, the objections treated under this Proposition have no force.

In the case of *Caldwell v. Auger* cited (Brief p. 36) (4 Minn., 156) was a case in which the question arose as to the right to prove an admission as an estoppel in pais without pleading it. Court held it could be proven, but there are no facts similar to our case and has no application.

The case of *Crippen v. Graham* is evidently wrong for there is no such case reported in 88 N. Car.

Charleston v. Collins was not available.

PROPOSITION G.

Erroneous admission of evidence as to custom. Persons who are engaged in a particular trade or business, or persons accustomed to deal with those in a particular business, may be presumed to have knowledge of the uniform course of dealing in such business.

STATEMENT.

Witness for defendant, A. M. Joffroy, testified (p. 299) :

“I am familiar with the files of the Southern Pacific Company at Nogales, Arizona, with reference to orders for cars for shipments out of Nogales, Arizona.”

(p. 302)

“We had cars at Nogales that could have been used by plaintiff on May 10th.”

(p. 303)

“Q. Now could they not have ordered some and received them?

A. I should say yes.”

(pp. 304-305)

“A. Yes, sir. So the mere fact that we had given the use of these cars to some one else on the 9th would not have prevented Mr. Hall or Mr. Oliver from wiring to Tucson and having the cars down there for the 12th, if they had use for them. They could have secured them on the 12th, notwithstanding they cancelled the order for the cars that they ordered on the 9th.”

“Q. You would not expect people to order cars unless they had use for them, would you? Now, Mr. Witness isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Cancellation telegram, Defendant's Exhibit No. 1, (p. 43) :

"Tucson, Ariz., May 9, 1913.

"Agent Southern Pacific Co.,
Nogales, Ariz.

"Referring to our file number two car order for thirty-two Santa Fe stock cars load your station tomorrow please cancel as cattle not ready writing you from El Paso.

8:30 a. m.

K. D. Oliver."

AUTHORITIES.

3 Ency. of Evidence, 933, and cases cited.

DISCUSSION.

There was no effort on the part of the defendant to show they were ignorant of that custom, and they, therefore, cannot complain. We cannot see how defendant is prejudiced by the ruling, nor do we see that it helped us, except to merely explain the general course of dealing in Nogales in regard to cars, so as to over-come the apparent inference raised by defendant, that plaintiff made it impossible for it to perform the contract. An examination of telegram cancelling the cars specifically states, "please cancel as cattle not ready", leaving sufficient inference that they would be needed later when cattle would be ready. The only way in which the failure on the part of plaintiff to furnish cars could have effected the defendant is, if cars were not there when cattle were ready to load, defendant could have delivered in yards and would then be relieved from loading. Therefore, we feel the court committed no error in allowing Jeffrey to testify.

All the cases cited (p. 37) are inapplicable, as in

those cases the question arose as to the proof of a custom that was the material issue in the case, and the evidence was objected to as not proving custom, while in our case the objection was (p. 305) that it was immaterial and incompetent,—hence the cases cited do not apply.

PROPOSITION H.

Refusal to charge defendant's written supplemental report No. 4 was error.

STATEMENT.

The charge set out in brief (p 38) does not contain all the charge as requested (See page 324). The Court instructed, (p. 337) :

“If you believe that the cattle tendered to the plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff's part, which relieved the defendant from any further duty to be performed on its part and justified the defendant, the Alamo Cattle Company, in writing the letter dated May 13th, declaring the plaintiff's rights in the contract forfeited.”

(pp 341-342)

“In other words it was the duty of the defendant upon receipt of fifteen days' notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o. b. cars at Nogales Station, all duties and expenses

paid, the cattle called for under the terms of the contract.”

DISCUSSION.

The telegram complained of (Exhibit L.) demanded the cattle under contract for delivery between May 29th and June 1st. It should be remembered that the contract placed upon us the duty of giving fifteen days' notice, and that the deliveries were to be made in April and May. The telegram was sent on May 14th and delivery could not be demanded under fifteen days, which plaintiff gave defendant; and we see no way in which the defendant can be injured by merely requesting it to comply with its contract, and we feel the above charges as given fulfill all the requirements of the contract.

The case cited (p. 38) have no application in the instant case and have been discussed under Point No. 3.

PROPOSITION I.

Erroneous admission of evidence as to compromise contract.

STATEMENT.

On re-cross examination (pp 208-209) plaintiff testified:

“A. The agreement that we made was that he was to deliver to me a thousand head of steers, three and four year olds—I won't say four year olds. I thing Mr. Kibbey stated that he would not make them all fours. I considered any kind of a settlement that

would avoid a lawsuit was a good way, and accepted his proposition to deliver me a thousand four year olds in the fall and give me a contract showing the receipt of ten thousand dollars advanced on that contract. And that was the only proposition that we agreed upon. He agreed to do that, and I agreed to accept it. He afterwards went back on it.

On re-direct when an examination was made as to this new agreement, defendant objected (Error X pp 94, 209-211) on the ground that the question was leading and not proper re-direct examination, and further that it was incompetent. On cross-examination (p. 152) plaintiff testified:

“Mr. Kibbey thought that he was entitled to a certain amount of this money, on account of having to gather and hold these cattle, and I told him it was no fault of mine that he did not have the cattle to deliver to me in train-load lots as required by the contract; that I was damaged more than he was. But he seemed to insist that that was the best settlement that he would make—allow him to retain four thousand dollars, and pay me six thousand dollars in deferred payments, to which I objected. And I told him that I considered the damage was coming to me, not to him; that I had the cattle sold. I explained to him how I had these cattle sold out, and I would have to lose my profit on the cattle; and we discussed it back and forward for considerable time, and finally he said that he would not make any settlement unless he could get approximately four thousand dollars out of the deal in some way or other, and we finally—he finally

said that he thought he could make four thousand dollars profit on this thousand head of big steers, if I would give him until fall to get them. I told him I would do it if he gave me a contract and a receipt on the contract for ten thousand dollars. I would have taken ten thousand dollars from Mr. Kibbey or any one else at that time and date and would have quit the deal.”

DISCUSSION.

Under this proposition plaintiff in error alleges “What was done or not done pursuant to the compromise contract was not relevant to the issue set forth in the pleadings, in which there is no mention of such a contract.” It should be remembered that this alleged settlement was principally developed by counsel for defendant on re-cross examination (pp 208-209), and the objected to question and answer was merely re-direct examination on matter developed on re-cross examination.

The case cited (p. 39—*Jordan v. Fenno*) was a case in which there was an attempt to vary the terms of a written instrument, and the court held that proof of a different contract could not be made in the absence of an allegation of fraud, and this case does not apply.

In the case of *Feuchtwanger v. Manitawoc M. Co.* (187 Fed. 713) Circuit Court of Civil Appeals for the Seventh Circuit held that in order to introduce evidence of modification or a waiver of a contract, it

must be shown that there was a plea of modification or waiver, and in our case there is no such plea, and we, therefore, contend that the court was proper in his rulings.

In the Owl Creek Coal Co. v. Golder, the Court stated the quotation given in brief, in a case in which there were no facts similar to ours.

POINT NO. 5.

The learned Court erred in denying the defendant's motion for a directed verdict on the ground of a variance between the proof and the pleading on the part of plaintiff.

STATEMENT.

(See statement under proposition H.)

W. B. Kibbey testified (pp 220-221) :

“Mr. Oliver then made the suggestion if we would deliver them one thousand head of three and four year old steers in the fall at \$32 a head, that in that way we would get \$4000 over and above the contract price that we had sold them for—four year old steers at that time, and he asked me whether that would be satisfactory or not. I told Mr. Oliver that it was absolutely impossible for me to make any arrangement, unless I consulted Mr. Myers, because Mr. Myers I considered was a party in these contracts and his interests had to be taken care of. I told him, however, I would speak to Mr. Myers and get his decision.”

Defendant's Exhibit 8, introduced, (p. 222) as follows:

“K. D. Oliver, Nogales, May 13th, via Tucson, Ariz., May 14th, W. D. Oliver, El Paso, Texas. Myers refuses to compromise. Advise if you wish to go ahead with our verbal agreement. Alamo Cattle Company, Kibbey, President.”

PROPOSITION A.

The evidence did not show a valid contract made between the plaintiff and defendant—no mutuality.

DISCUSSION.

This is too clear to elaborate upon. Kibbey said he would not accept. He sent Exhibit 8, saying Myers would not accept. Hall testified: “He agreed to do that, and I agreed to accept it. He afterwards went back on it,” and that they never delivered any cattle under it (p 210). The evidence never was in shape to show a subrogation.

PROPOSITION B.

In an action for a breach of a contract, defendant’s failure to plead a modification thereof, is a waiver of that defense.

STATEMENT.

There was no new contract placed by either party.

AUTHORITIES.

Sutter v. Raeder, 50 S. W., 813—149 Mo. 297.

Feuchtwanger v. Manitawoc M. Co., 187, Fed.,
713.

DISCUSSION.

This is strictly a legal proposition, and we cannot see where defendant can find the elements of a new contract, as there is especially lacking any consideration, mutuality or subrogation, and to up-hold this we have only to point the court to Proposition I., on page 39 of brief of Plaintiff in Error, where they contend, "What was done or not done pursuant to the compromise contract was not relevant to the issue as set forth in the pleadings, in which there is no mention of such a contract".

The cases cited on pages 40 and 41 of the brief held that proof of an entirely different agreement than that set up in the pleadings or judgment asked on a different contract than that declared upon, would not be allowed, and, therefore, the cases have no application to ours.

In this connection we desire to call the court's attention to the case of Feuchtwanger v. Manitawoc M. Co. (187 Fed. 713) (Brief p. 39) which holds that defendant has waived his right under a new contract if he has not plead it, and the same ruling was made by the court in the case of Sutter v. Raeder, Supra.

POINT NO. 6.

The motion for a new trial should have been granted.

STATEMENT.

This specification is too general, and has been covered by us in the foregoing.

CONCLUSION.

For the reason stated specially under each sub-head of this brief, we do not feel that the court has committed error, but was equitable and just in its ruling on the evidence and in its instruction to the jury. However, if the Court has erred, as charged by the specifications, it is not of such materiality and weight as to have caused injury to plaintiff in error.

Wherefore, Defendant in Error for the reasons herein stated, says the judgment of the District Court should be affirmed with costs.

Respectfully submitted,

GEORGE J. STONEMAN,

REESE M. LING,

CHAS. R. LOOMIS,

FRED C. KNOLLENBERG,

Attorneys for Defendant in Error.

Dated San Francisco, California,

October 15, 1914.

No. 2456

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

CHARLES EDWARD GRELLE AND THE INDEPENDENT
FOUNDRY COMPANY, a corporation,
Appellants,

vs.

THE CITY OF EUGENE, OREGON, AND M. F.
GRIGGS,
Appellees.

Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

Filed

AUG - 1 1914

F. D. Monckton,
Clerk.

No.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

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Appellants,

vs.

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Appellees.

Appeal from the District Court of the United States for the District of Oregon.

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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

CHARLES EDWARD GRELLE AND THE INDEPENDENT FOUNDRY COMPANY, a corporation,

Appellants,

vs.

THE CITY OF EUGENE, OREGON, AND M. F. GRIGGS,

Appellees.

**Names and Addresses of Solicitors
upon this Appeal:**

For Appellants:

T. J. Geisler,

Henry Bldg., Portland, Oregon

For Appelees:

G. F. Skipworth,

Eugene, Oregon

J. M. Pipes

Portland, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 20 day of December, 1912, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE, and THE INDEPENDENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS,

Defendants.

TO THE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

The complaint of the above named plaintiffs respectfully shows:

I.

That Charles Edward Grelle, of the above named plaintiffs, is a resident of the city of Portland, in the above named district of Oregon, and that The Independent Foundry Co., the other party plaintiff, is a corporation duly organized under the laws of the state of Oregon, and has its principal place of business also

in said city of Portland and district of Oregon.

That the above named defendant, the City of Eugene, is a duly incorporated city in the state and district of Oregon, and that the defendant, M. F. Griggs, is a resident of said City of Eugene.

II.

That prior to the 2nd day of January, 1912, the plaintiff Grelle was the true, original and sole inventor of a new and ornamental design for an article of manufacture, towit: a five-light Lamp Post, a blue print of the drawing of which ornamental design is hereto attached, marked "Exhibit A" as a part of this complaint, such drawing constituting a part of the application for patent hereinafter referred to.

III.

That thereupon and about the 2nd day of January, 1912, the plaintiff Grelle duly filed in the office of the Commissioner of Patents of the United States an application, in due form, whereby he prayed for the granting of the letters patent to him on said ornamental design for the period and term of seven years, in accordance with the statutes for such cases provided.

IV.

That the said ornamental design was not known or used by others in this country before the invention thereof by the plaintiff Grelle and was not patented or described in any printed publication in this or any foreign country before the invention thereof by the plaintiff Grelle, or more than two years prior to his said application for letters patent thereon, and was

not in public use or on sale in this country for more than two years prior to his said application for patent, nor had said invention been patented in any country foreign to the United States, nor had any application for patent been filed by the plaintiff Grelle, or his legal representatives or assigns, in any country foreign to the United States prior to his said application.

V.

That thereafter, upon due proceedings had, it was duly adjudged by said Commissioner of Patents that the plaintiff Grelle was the true, original and sole inventor of said ornamental design for Lamp Post, and lawfully entitled to a patent thereon for the term of seven years, as prayed for in his said application, and thereupon such proceedings were had that on the 12th day of March, 1912, letters patent of the United States were duly issued to said plaintiff Grelle, for said new and ornamental design, said letters patent being dated the 12th day of March, 1912, and being No. 42,283, and whereby there was granted unto plaintiff Grelle, his legal representatives and assigns, the exclusive right of making, using and vending said invention throughout the United States, and the territories thereof, for the period of seven years from the date of said letters patent. That the plaintiff will produce and have ready in court the said letters patent of the United States at the hearing of this cause and as the court may direct.

VI.

That said application for letters patent of Plaintiff Grelle was intended to cover and protect, and plain-

tiffs claim that said letters patent No. 42,283 thereon issued, did relate to, cover and protect the application of said ornamental design to all types of lamp posts embodying a plurality of laterally or radically disposed arms, nevertheless the plaintiff Grelle, about the 2nd day of October, 1912, in order to specifically cover the essence and substance of said ornamental design to a five-light lamp post, (if by law required) duly filed a further application for letters patent in the office of the Commissioner of Patents of the United States, praying for the granting of letters patent to him, on such specific application of said ornamental design, for the period and term of seven years. That thereafter it was duly adjudged by said Commissioner of Patents that said plaintiff Grelle was the true, original and sole inventor of said ornamental design in its specific application for a five-light lamp post, and entitled to a patent thereon for the term of seven years, as prayed for in his said application. And thereupon such proceedings were had that on the 10th day of December, 1912, letters patent of the United States were duly issued to said plaintiff, Grelle, on said last mentioned application, said letters patent being numbered 43,338, and whereby there was granted unto the plaintiff Grelle, and his legal representatives and assigns, the exclusive right of making, using and vending the invention so patented throughout the United States and the territories thereof for the period of seven years from the date of said last mentioned letters patent. That the plaintiffs will also produce and have ready in court the last mentioned

letters patent of the United States at the hearing of this cause and as the court may direct.

VII.

That prior to the acts of defendants hereinafter complained of, the plaintiff Grelle granted unto the plaintiff The Independent Foundry Co. the exclusive license to practice said invention under said letters patents in the said district of Oregon, and other places, and said exclusive license is still in full force.

VIII.

That by virtue of said exclusive license, the said Independent Foundry Co. did equip itself to manufacture lamp posts embodying said patented ornamental design, and did extensively advertise such fact, and offer to manufacture lamp posts embodying said ornamental design for whomsoever would require the same, and that in so getting ready for the manufacture of lamp posts embodying said patented ornamental design, and advertising the same, the plaintiffs expended large sums of money.

IX.

That in seeking a market for lamp posts embodying said patented ornamental design, the plaintiffs, about October, 1911, particularly brought said invention to the notice of the Water Board of the City of Eugene, in said district, and fully disclosed said ornamental design to the officers of said City of Eugene, and in particular to its Water Board.

That plaintiffs have attached hereto, as a part of this complaint, a cut, marked Exhibit A, which cut is reproduced from the photograph taken from a lamp

post manufactured by plaintiffs, embodying said patented ornamental design, and that said photograph was taken about November 14, 1911.

That thereafter and about the early part of January, 1912, plaintiffs became apprised of the fact that said Water Board of the City of Eugene had determined to equip certain streets in said City of Eugene with lamp posts embodying said ornamental design, but that instead of giving the order for said lamp posts to the plaintiffs, said Water Board had entered into a contract with Gross Bros. Iron Works, of said City of Eugene, for the manufacture of said lamp posts.

That thereafter and about the early part of November, 1911, at the request of said Water Board, of said City of Eugene, plaintiffs sent to said Water Board a photo of a lamp manufactured by plaintiffs, The Independent Foundry Co., embodying said patented ornamental design. That said Water Board were and are the particular agents of said City of Eugene, having charge of the furnishing of light by said city to its residents. That shortly thereafter, towit: about the latter part of November, 1911, said Water Board informed the plaintiffs that they had concluded to adopt a design like that shown in the photo last referred to as furnished by plaintiffs to defendants; and the said Water Board furthermore sent plaintiffs a blue print of a drawing for lamp posts which were to be erected in said City of Eugene, also specifications of the details to be followed in the mechanical construction of such lamp posts. That a blue print of a

tracing of said blue print so furnished by said Water Board to defendants is hereby attached marked Exhibit B, as a part of this complaint, and plaintiffs allege that the ornamental design embodied in defendants said drawing of lamp post is copied from and is substantially identical with that patented to the plaintiff Grelle, as above stated.

That plaintiffs thereupon made their bid to said Water Board and informed the latter that they were prepared to make and deliver lamp posts in accordance with such bid.

That thereafter said City of Eugene, notwithstanding that its officers and agents well knew that the plaintiff Grelle was the original inventor of said ornamental design which the said Water Board desired to have copied in the lamp posts to be erected in said City of Eugene, instead of placing an order therefor with the plaintiff The Independent Foundry Co., induced a certain foundry and iron works, to wit: Gross Bros. Iron Works, located in said City of Eugene, to make for the latter lamp posts copying and infringing upon said design.

X.

That thereafter and about the 11th day of January, 1912, plaintiffs, having become apprised of the fact that said City of Eugene had determined to equip certain of its streets with lamp posts infringing said ornamental design, and for that purpose had entered into a contract with said Gross Bros. Iron Works of said City of Eugene for the manufacture of such lamp posts, the plaintiffs duly notified said City of

Eugene, in writing, through its officers, of the pendency of said application for letters patent of the United States, on behalf of plaintiff Grelle, on said Ornamental Design, and that plaintiffs would prosecute any infringers thereof as soon as letters patent on said application were issued.

XI.

That thereafter and about the 14th day of March, 1912, the plaintiffs, having ascertained that the defendants, notwithstanding said written notice and warning referred to in the preceding paragraph, had induced and procured said Gross Bros. Iron Works to manufacture for said Water Board lamp posts substantially identical with and infringing said ornamental design, and the application for letters patent of the United States on said ornamental design having in the meantime been successfully prosecuted, and the above mentioned letters patent granted thereon, plaintiffs caused the said City of Eugene to be duly notified, in writing, through its officers, of the issuance of said letters patent on said ornamental design, and plaintiffs furthermore particularly demanding by said notice that said City of Eugene desist from procuring, to be manufactured or erected in said City of Eugene, lamp posts infringing upon said patented ornamental design.

XII.

That notwithstanding said notices given by the plaintiffs to said City of Eugene, the latter, with full knowledge of all said facts, and in wilfull defiance of the rights of plaintiffs in the premises, did procure

from said Gross Bros. Iron Works lamp posts infringing said patented ornamental design, and did thereupon sell one of such infringing lamp posts to M. F. Griggs, a resident in said City of Eugene, and caused the lamp post sold to said Griggs to be erected on the sidewalk in front of the premises owned or controlled by the defendant, M. F. Griggs, in said City of Eugene; and said City of Eugene did further sell and erect others of said infringing lamp posts in other places in the streets of said City of Eugene; all said acts being without the consent, and in wilfull violation of the rights, of plaintiffs in the premises. That said City of Eugene, furthermore, through its said Water Board, is now furnishing the electricity for and is lighting, maintaining, using and operating, and is profiting by the use and operation of said infringing lamp posts, without the consent, and in wilfull violation, of the plaintiffs in the premises.

XIII.

That likewise the defendant, M. F. Griggs, though possessed of full knowledge that said lamp post erected on the sidewalk in front of the premises owned or controlled by him in said City of Eugene is an infringement of said patented ornamental design of plaintiffs, and violates the rights of the latter in the premises, nevertheless is maintaining and using said lamp post without the consent, and in violation of the rights of plaintiffs in the premises.

XIV.

That plaintiffs have attached hereto, marked Exhibit C, as part of this complaint, a photographic re-

production of the particular infringing lamp post sold by said City of Eugene to the defendant, M. F. Griggs, and now erected and being used and maintained by the defendants on the sidewalk in front of the premises owned or controlled by the defendant, M. F. Griggs, in said City of Eugene, all without the consent, and in wilfull violation of the rights of plaintiffs in the premises.

XV.

That said City of Eugene is now seeking to induce other residents of its said city to purchase from it lamp posts infringing upon said patented ornamental design, and also to induce other residents of said City of Eugene to permit the latter to erect in front of their premises in said City of Eugene, and to use and maintain in use, lamp posts substantially identical with and infringing upon said patented ornamental design, in wilfull violation of plaintiffs rights in the premises.

XVI.

That mere compensation for said wrongful acts of the defendants would be wholly inadequate to the plaintiffs in the premises, for the plaintiffs desire to themselves manufacture lamp posts under said letters patent, and to this end the plaintiff, the Independent Foundry Co., as already mentioned, has made expensive patterns, and otherwise equipped itself at great expense to be ready to manufacture lamp posts embodying said ornamental design for the general public; and such equipment and enterprise of plaintiffs will be rendered wholly valueless, and the plaintiffs

irreparably injured, if the defendants, in open and wilfull violation and defiance of plaintiffs rights in the premises, be now permitted to sell and use, or even merely use lamp posts infringing upon said patented ornamental design; and that plaintiffs have no adequate and sufficient remedy in the premises, except by the process of injunction of this court, enjoining and forbidding the defendants from continuing further their said unlawful acts.

WHEREFORE the plaintiffs pray the court to grant a preliminary and also a permanent injunction directed against the defendants and each of them, their agents and employees, strictly enjoining them not to make or sell, or cause to be made or sold, or used, or maintained in use, directly or indirectly, any lamp posts infringing upon said patented ornamental design, particularly forbidding the use of said lamp post erected on the premises of the defendant, Griggs, and also enjoining the defendant, said City of Eugene, from furnishing electricity, or other lighting agent, to lamp posts erected in said City of Eugene and infringing said patented ornamental design. That plaintiffs recover from the defendant, said City of Eugene, the sum of Two Hundred and Fifty Dollars (\$250.00) as by statute provided, for each and every unlawful act of said defendants in selling lamp posts infringing upon said patented ornamental design, and that the defendant, said City of Eugene, be furthermore compelled to account for and pay over to your plaintiffs all profits which said City of Eugene has delivered or otherwise received by reason of its said

unlawful acts.

That the plaintiffs furthermore recover from the defendants, and each of them, all other and further damages which plaintiffs have sustained by reason of said unlawful acts of defendants, and that the Court, by reason of the wilfull conducts of defendants in the premises, increase the amount so ascertained three times, in accordance with the law for such cases provided.

That all lamp posts in the possession of or under the control of defendants, or either of them, be destroyed.

That the plaintiffs may have such further and other relief as to the Court may seem just and meet, and recover their costs and disbursements in this suit.

And plaintiffs further pray that the defendants may be required to make direct and perfect answers, in writing, but not under oath, according to their best knowledge, remembrance, information and belief, to the several interrogatories set forth below, that is to say:

1. The defendant, said City of Eugene, shall answer whether since the 12th day of March, 1912, it has caused to be made or delivered anywhere within the district of Oregon, particularly in said City of Eugene, lamp posts substantially embodying said patented ornamental design, or similar thereto, and if so, how many it did so make, or cause to be made, when and where the same were made, by whom they were

made, when they were delivered, giving full particulars as to each delivery made, to whom delivered, and where delivered; also stating in detail the cost of said lamp posts to the defendant, said City of Eugene, and the profits made by the latter thereon in reselling the same.

2. Whether the defendant, said City of Eugene, has erected in its said city, or is now maintaining or using therein, or is furnishing light for, any lamp posts substantially embodying said patented ornamental design, or similar thereto, and if so, that it state fully the location of each of such lamp posts, when each of said lamp posts were erected, at whose instance the same were erected, the name or names of the person controlling the premises upon which any of such lamp posts are so erected, and how, and by whom the same are now being maintained in use, stating fully all the particulars relating to the matters embodied in this interrogatory.

3. The defendant, M. F. Griggs, shall answer at whose instance the lamp post shown in the photograph Exhibit B, hereto attached, was erected, when said lamp post was erected, from whom he procured said lamp post, or who furnished the same to him, at whose cost said lamp post was erected, and if at defendant Griggs' cost, that he state the amount he paid or still owes for such lamp post, and from whom said defendant, Griggs, receives the power for lighting said lamp post; stating fully all facts in connec-

tion with each transaction referred to in this interrogatory.

THE INDEPENDENT FOUNDRY CO.,

By Charles Edward Grelle.

T. J. GEISLER,

Solicitor & Counsel

for Plaintiffs.

[Endorsed]: Bill of Complaint. Filed Dec. 20,
1912.

A. M. CANNON,

Clerk U. S. District Court.

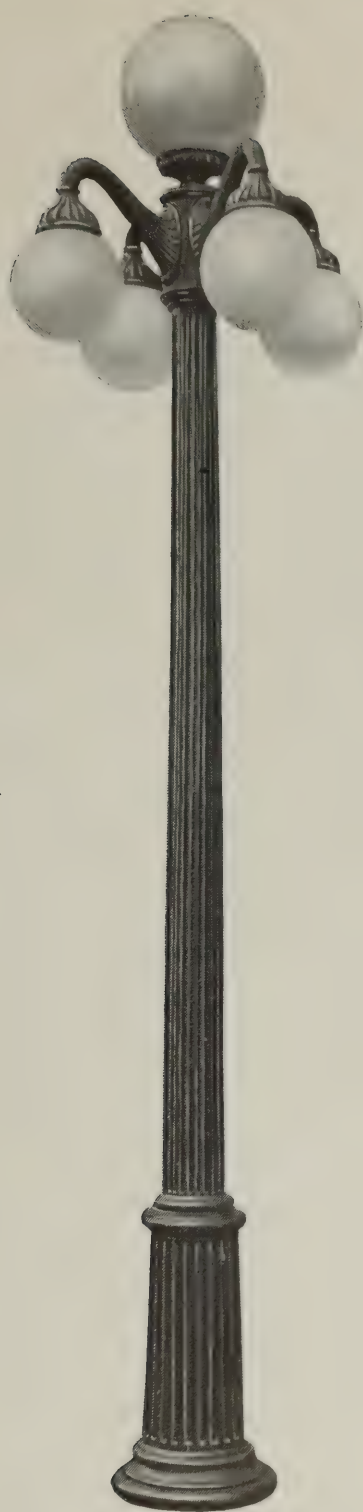


EXHIBIT "A"

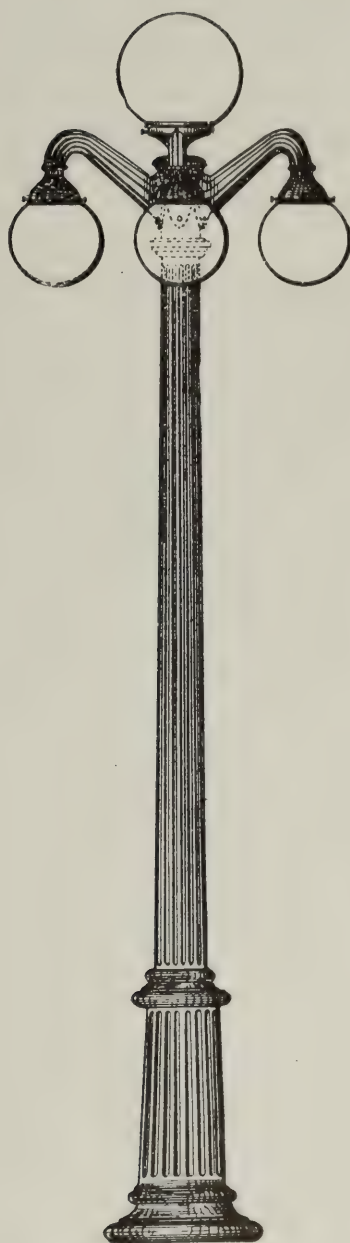
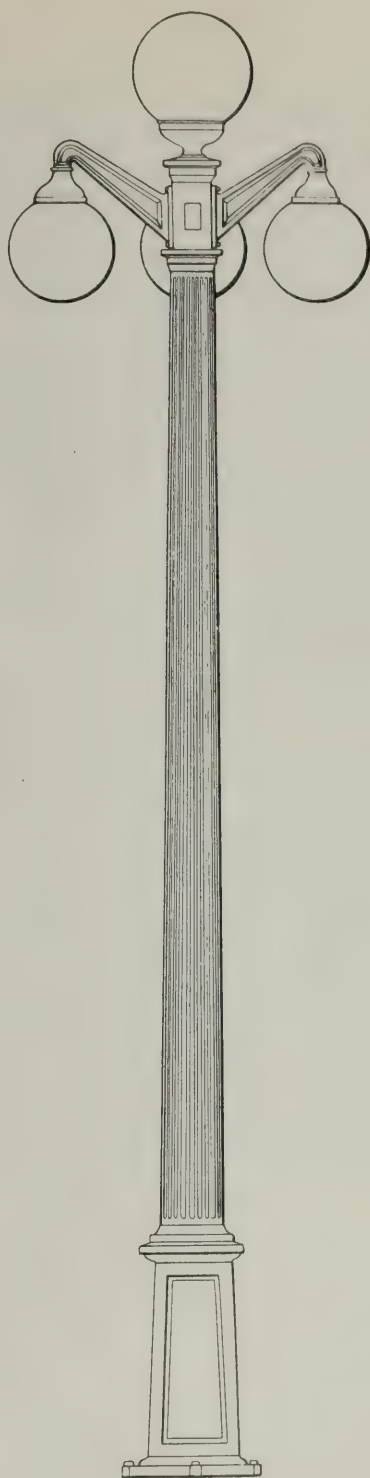


EXHIBIT "A"



TRACING
MADE BY

WM. C. SCHMITT 12-13-'12
of a blue print entitled as
follows,

EUGENE LIGHT DEP'T

STANDARD ORNAMENTAL POST

Scale 1" = 1'

Nov 29, 1911



EXHIBIT "C"

And afterwards, to wit, on the 14 day of May, 1913, there was duly filed in said Court, an Amended Answer, in words and figures as follows, to wit:

[Amended Answer.]

*"In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE, and THE INDEPENDENT
FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named defendants, answering the Bill of Complaint of plaintiffs herein and for Amended Answer admit, deny and allege as follows:

I.

Answering paragraph I of defendants admit that Charles Edward Grelle of the above named plaintiffs is a resident of the City of Portland, in the above named District of Oregon, and that Independent Foundry Company, the other party plaintiff, is a corporation duly organized under the laws of the State of Oregon, and has its principle place of business in said City of Portland, and District of Oregon; that the above named defendant the City of Eugene is a duly incorporated City in the State and District of Oregon; that the defendant M. F. Griggs is a resident of said City of Eugene.

II.

Answering paragraph II defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that prior to the 2nd day of January, 1912, or at any time, the plaintiff Grelle was the true, original or sole inventor of a new or ornamental design for an article of manufacture, towit:—a five light lamp post, a blue print of the drawing of which alleged ornamental design is attached to plaintiffs complaint herein and marked “Exhibit A.”

III.

Answering paragraph three defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that about the 2nd day of January, 1912, or at any time, the said Grelle filed in the office of the Commissioner of Patents of the United States an application, in any form, whereby he prayed for the granting of letters patent to him on any ornamental design whatever for the period or term of seven (7) years, or for any term or period of time whatever, in accordance with the statute for such cases provided, or otherwise, in any manner whatsoever.

IV.

Answering paragraph four defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that said alleged ornamental design claimed to be patented by plaintiff was not known or used by others in this country before the alleged invention thereof

by the plaintiff Grelle; that said design was not patented or described in any printed publication in this or in any foreign country before the alleged invention thereof by the plaintiff Grelle, or more than two years prior to his said alleged application for letters patent thereon; that said design was not in public use or on sale in this country for more than two years prior to his said alleged application for patent; that said alleged invention had not been patented in any country foreign to the United States, and that no application for patent had been filed by the plaintiff Grelle or his legal representatives or assigns in any country foreign to the United States prior to his alleged application, or at any time.

V.

Answering paragraph five defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that thereafter or at any time upon due or any proceedings had it was duly, or otherwise, adjudged by said Commissioner of Patents that the said Grelle was the true, original or sole inventor of said alleged ornamental design, for a lamp post, or lawfully, or in any manner, entitled to a patent thereon for the term of seven years or for any term or time whatever, as prayed for in said alleged application, or otherwise in any manner; that thereupon, or at any time, such proceedings were had that on the 12th day of March, 1912, or at any other time, letters patent of the United States were duly or otherwise issued to said plaintiff Grelle for said alleged new and ornamental design;

that said alleged letters patent were dated the 12th day of March, 1912, or dated at all, or numbered 42,-283, or numbered at all; that there was thereby, or otherwise, granted unto the said Grelle, or his legal representatives or assigns, or to any one, the exclusive right to make, use or vend said alleged invention throughout the United States or the territories thereof for the period of seven years from said alleged date of said alleged letters patent, or for any period of time whatever, from any date whatever; that plaintiffs, or any of them will produce or have ready in Court the said alleged letters patent of the United States at the hearing of this cause, or at any time, or place, as the Court may direct, or otherwise, in any manner.

VI.

Answering paragraph six defendants deny that said alleged letters patent numbered 42,283, or any letters patent whatever, protected or protects, said alleged ornamental design to all or any types or type of lamp posts embodying a plurality of laterally or radially disposed arms.

Further answering paragraph six defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that letters patent No. 42,283, or otherwise, or without number, issued on, related to, or covered, said alleged ornamental design to all or any types or type or lamp posts embodying a plurality of laterally or radially disposed arms; that plaintiff Grelle about October 2nd, 1912, or at any time, filed a further ap-

plication for letters patent in the office of the Commissioner of patents of the United States praying for the granting of letters patent to him on such alleged specific application of said alleged ornamental design for a period or term of seven years or for any period or term of time whatsoever; that thereafter, or at any time, it was adjudged by said Commissioner of Patents that said plaintiff Grelle was the true, original or sole inventor of said alleged ornamental design in its specific application for a five light lamp post, or otherwise; that thereupon, or at any time, or on any proceedings had, there were issued to the plaintiff Grelle, on December 10th, 1912, or at any time, letters patent of the United States on said last mentioned alleged application; that there was granted to plaintiff Grelle, or his representatives or assigns, the exclusive, or any, right of making, using, or vending the alleged invention so alleged to be patented, any place, for, or at, any time; that plaintiffs or any of them will produce or have ready in Court said last mentioned alleged letters patent of the United States at the hearing of this cause, or at any time, or place, as the Court may direct or otherwise, in any manner.

VII.

Answering paragraph seven defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that prior to the acts of defendants, in plaintiffs complaint herein complained of, or at any time, the plaintiff Grelle granted unto the Independent Foundry Company the exclusive, or any, license to practice said al-

leged invention under said alleged letters patent in the said District of Oregon, or any place, or that said alleged exclusive license is or has been, at any time, in full force.

VIII.

Answering paragraph eight defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny that by virtue of said alleged exclusive license, or otherwise, the said Independent Foundry Company did equip itself to manufacture lamp posts embodying said alleged patented ornamental design, or did extensively, or otherwise, advertise such alleged fact, or did offer to manufacture lamp posts embodying said ornamental design for whomsoever would require the same, or that plaintiff expended large, or any, sums of money whatever in getting ready for the manufacture of lamp posts embodying said alleged patented ornamental design, or in advertising the same.

IX.

Answering paragraph nine defendants admit: that in seeking a market for lamp posts embodying said alleged patented ornamental design plaintiffs, about October 1911, fully disclosed said alleged ornamental design to the officers of the said City of Eugene, and particularly brought said alleged invention to the notice of the Water Board of said City; that thereafter, and about the early part of November, 1911, at the request of said Water Board of said City of Eugene, plaintiffs sent to said Water Board a photo of a lamp post manufactured by plaintiff Independent

Foundry Company embodying said alleged patented ornamental design; that said Water Board were and are the particular agents of said City of Eugene, having charge of the furnishing of light by said City to its residents; that plaintiffs made a bid to said Water Board and informed the latter that they were prepared to make and deliver lamp posts in accordance with such bid; that the said Water Board sent plaintiffs a blue print of a drawing for lamp posts which were to be erected in said City of Eugene, also specifications of the details to be followed in the mechanical construction of such lamp posts.

Further answering paragraph nine defendants deny: That the alleged ornamental design embodied in defendants said drawing of a lamp post is copied from or is substantially identical with or similar to that alleged to have been patented by plaintiff Grelle; that the officers or any officer of defendant City of Eugene knew or that plaintiff Grelle was the original inventor of said alleged ornamental design which it is alleged the Water Board desired to have copied in the lamp posts to be erected in said City of Eugene; that defendant City of Eugene induced the Gross Bros. Iron Works, or any one, to or that the Gross Bros. Iron Works, or any one, did make for said City of Eugene lamp posts copying or infringing upon said design.

Further answering paragraph nine defendants admit that there is attached to plaintiffs complaint a blue print marked "Exhibit B," but allege that they have no knowledge or information sufficient to form

a belief as to the truth and therefore deny that said blue print is a tracing of any blue print alleged to have been furnished by said Water Board to defendants or to plaintiffs.

Further answering paragraph nine defendants admit that there is attached to plaintiffs' complaint a cut marked "Exhibit A," but allege that they have no knowledge or information sufficient to form a belief as to the truth and therefore deny: that said cut is reproduced from a photograph taken from a lamp post manufactured by plaintiffs embodying said alleged patented ornamental design; that said photograph was taken about November 14th, 1911.

X.

Answering paragraph ten defendants deny that thereafter and about the 11th day of January, 1912, or at any time the City of Eugene determined to equip certain or any streets in said City of Eugene with lamp posts embodying said alleged ornamental design or that plaintiff at any time became apprised of any such fact, or that said City of Eugene at any time entered into a contract with Gross Bros.' Iron Works, of said City of Eugene, or with any one for the manufacture of such lamp posts or of any lamp posts embodying said alleged ornamental design.

Further answering paragraph ten defendants admit that about January 11, 1912, plaintiffs notified defendant City of Eugene in writing of the alleged pendency of said alleged application for letters patent of the United States on behalf of said Grelle on said alleged ornamental design and that plaintiffs would prosecute

any infringers thereof as soon as letters patent thereon were issued.

XI.

Answering paragraph eleven defendants allege that they have not knowledge or information sufficient to form a belief as to the truth and therefore deny that the alleged application for letters patent of the United States on said alleged ornamental design had in the meantime or at any time been successfully procured or allowed or letters patent granted thereon.

Further answering paragraph eleven defendants deny that they or either of them at any time induced or procured the Gross Bros. Iron Works or any one to manufacture for said Water Board lamp posts substantially identical with or in any way infringing upon said alleged ornamental design.

Further answering paragraph eleven defendants admit that plaintiffs caused said City of Eugene to be notified in writing of the alleged issuance of letters patent on said alleged ornamental design demanding in said notice that said City of Eugene desist from procuring to be manufactured or erected in said City of Eugene lamp posts infringing upon said alleged patented ornamental design.

XII.

Answering paragraph twelve defendants deny: that defendant City of Eugene procured from said Gross Bros. Iron Works, or from any one, lamp posts infringing said alleged patented ornamental design, or did sell any such post to defendant M. F. Griggs, or did cause any such post to be erected any place in said

City of Eugene; that said defendant City of Eugene sold or erected any such lamp post to any one or at any time; that any acts of defendants as in plaintiffs' complaint herein complained of have in any way violated any right or rights of plaintiffs herein; that defendant City of Eugene in any manner has furnished or is furnishing electricity for or has lighted, maintained, used, operated or is lighting, maintaining, using or operating, or has profited by or is profiting by the use or operation of any such infringing lamp post, or in violation of any rights of plaintiffs herein in any manner whatsoever; that defendant City of Eugene sold any lamp post to M. F. Griggs, or to any one at any time.

XIII.

Answering paragraph thirteen defendants deny that the lamp post erected in front of the premises controlled by defendant M. F. Griggs is an infringement of said alleged patented ornamental design of plaintiffs or violates any right of the latter or is or has been maintained or used in violation of any rights of plaintiffs.

XIV.

Answering paragraph fourteen defendants admit that there is attached to plaintiffs' complaint and marked "Exhibit C," a photographic reproduction of a lamp post but deny that the same is of any infringing lamp post sold by defendant City of Eugene to defendant M. F. Griggs, or now erected or used or maintained by defendants in front of any premises owned or controlled by defendant M. F. Griggs any

place or in violation of any rights of plaintiffs or that the same is of any post sold by defendant City of Eugene to defendant M. F. Griggs or to any one, or of any post infringing any alleged patent.

XV.

Answering paragraph fifteen defendants deny that said City of Eugene has been at any time, or now is, seeking to induce any one to purchase from it lamp posts infringing upon said alleged patented ornamental design, or any lamp posts, or to permit the latter to erect any place, use or maintain in use any lamp posts substantially identical with or infringing upon said alleged patented ornamental design, or in any way in violation of any rights of plaintiffs.

XVI.

Answering paragraph sixteen defendants allege that they have not knowledge or information sufficient to form a belief as to the truth and therefore deny that plaintiff Independent Foundry Company has made expensive or any patterns or otherwise equipped itself at great or any expense for manufacturing lamp posts embodying said alleged patented ornamental design.

Further answering paragraph sixteen defendants deny: that mere compensation for any acts of defendants complained of would be inadequate to the plaintiffs; that any equipment or enterprise of plaintiffs would be rendered valueless or injured at all by the continuance by the defendants of any acts attributable to them; that plaintiffs have no adequate or sufficient remedy except by injunction.

XVII.

Further answering paragraph nine of plaintiffs complaint herein defendants deny that about the latter part of November, 1911, or at any time, said Water Board of the City of Eugene, informed the plaintiffs or any one else that they had concluded to adopt a design like that shown in the photo referred to in said paragraph nine as furnished by plaintiffs to defendants.

1.

For a first further and separate answer defendants allege:

I.

That the post maintained by defendants which plaintiffs claim infringes their alleged patent is not identical with, or in any manner similar to, plaintiffs alleged patented post so far as ornamental appearance to the eye is concerned, or at all; that said post maintained by defendants has a square base with square block panels while the post alleged to be patented by plaintiff has a round fluted base which is in every material essential vitally different from the base of the post maintained by defendants so far as appearance to the eye is concerned; that the head and arms of the post maintained by defendants are square paneled while the head and arms of the post alleged to be patented by plaintiff has round head and arms with fluting thereon and is in every material essential vitally different from the post maintained by defendants so far as appearance to the eye is concerned; that in shape, form, dimensions and appearances the

said post maintained by defendants is materially and essentially different from the post alleged to be patented by plaintiffs, which is described in plaintiffs complaint herein.

2.

For a second further and separate answer defendants allege:

I.

That the alleged patent which plaintiffs herein claim has been infringed upon by defendants as alleged in plaintiffs' complaint herein is not the result of inventive genius; is not novel in any way; would not require the exercise of originality or inventive faculties in designing, and that consequently said design is not patentable, and that if any patent has heretofore issued thereon the same is void, or any patent hereafter issued thereon would necessarily be void.

3.

For a third and separate answer defendants allege:

I.

That five (5) light lamp posts embodying the design claimed herein to be patented by plaintiff have been on sale and in public use for more than two (2) years prior to plaintiffs alleged application for a patent thereof, towit: On sale by the Independent Foundry Company, plaintiff herein, in the City of Portland, Oregon; used by the City of Portland, Oregon, by said City therein and also in and by numerous other cities of this and foreign countries.

II.

That defendants are informed and believe and

therefore allege that five (5) light lamp posts very similar in design to the design of post claimed to be patented by plaintiff and much more like them in appearance than the post maintained by defendants, which plaintiffs' claim infringes their alleged patent, are now and for more than two (2) years prior to plaintiffs alleged application for patent have been in use in the following Cities of this country, towit:

St. Paul, Minnesota, Grand Forks, North Dakota, Minneapolis, Minnesota, Chicago, Illinois, Kansas City, Missouri, Kansas City, Kansas, Des Moines, Iowa, Ft. Wayne, Indiana, Cincinnati, Ohio, Canton, Ohio, and also in the City of Puebla, Mexico.

III.

Defendants hereby give notice to plaintiffs and to plaintiffs' attorney that they intend to prove the foregoing allegations upon the trial of this cause.

4.

For a fourth further and separate answer defendants allege:

I.

That five (5) light lamp posts very similar in design to the design of post claimed to be patented by plaintiff and much more like them than the post maintained by defendants, which plaintiffs claim infringes their alleged patent have for a number of years immediately last past, and long prior to plaintiffs' alleged or supposed invention or discovery been and now are described in printed publications distributed throughout this country and foreign countries in advertising.

II.

That the parties making some of these publications, their addresses and designation of the types of post, are as follows, towit:

E. Metz, Jr., Kansas City, Missouri, L.S.-1;

McDonnell Iron Works, Des Moines, Iowa, styles Imperial, Crown and Regal;

Minneapolis Steel and Machinery Company, Minneapolis, Minnesota;

The Western Gas Construction Company, Fort Wayne, Indiana;

The Independent Foundry Company, Portland, Oregon, five lights, type B;

Western Electric Company, New York,-Chicago, etc., Cutters Boulevard Post; and the

Electric Railway Equipment Company, Cincinnati, Ohio, No. 10,040.

III.

The defendants hereby give notice to plaintiffs and to plaintiffs' attorney that they intend to prove the foregoing allegations upon the trial of this cause.

5.

For a fifth further and separate answer the defendants allege:

I.

That shortly prior to the 14th day of November, 1911, the defendant City of Eugene intended to and was about to install a street lighting system for said City, which required lamp posts, and defendant city's agents and officers at said time talked with the plaintiffs with a view of obtaining from them the required

lamp posts suitable and necessary for said lighting system. That thereafter, pursuant to said conversation and supplemental thereto, plaintiffs, on the 14th day of November, 1911, wrote and sent to defendant city a letter, which letter defendant received, and which letter was accompanied by a photograph of plaintiffs' lamp post mentioned and described in plaintiffs' complaint, and which letter was in substance an offer to furnish said lamp post at the very best price to be ascertained subsequently. That the defendant City of Eugene replied to said letter in writing on the 21st day of November, 1911, to the effect that the Water Board of said City desired plaintiffs' best quotation on the lamp post described in the said photograph, and also to the effect that the foundries in Eugene were desirous of competing for the work of making lamp posts for the said street lighting system, and that the defendant City would probably get out a design of its own for the lamp posts required, and that the defendant City would determine from a consideration of the prices quoted by plaintiff whether it would go to the trouble and expense of designing a special lamp post.

II.

That the plaintiffs replied to the said letter of November 21st on the 27th of November, 1911, to the effect that they were not in a position to quote fixed price on the design of the lamp post sent in said photograph, and said letter also advised the defendant City that the City could not afford to make a new and special design for such a limited number of lamp posts

as would be required. That the defendant City replied to said letter of November 27th on November 28th, 1911, thanking plaintiffs for information contained in their said letter and stating that the City was anxious to secure an exact quotation on lamp posts of which they had a photograph, as aforesaid.

III.

That the plaintiffs, replying to the defendant City's letter of November 28th, on December 1st, 1911, quoted the City a price of \$42.00 f.o.b. Eugene, for lamp posts as per the photograph referred to. The plaintiffs in this letter also state, in substance and effect, that they trusted that when the City was ready to take competitive figures it would give them a chance to put their quotation before the City in a formal proposition.

IV.

On December 7th, 1911, the defendant City sent to plaintiffs a letter inviting from plaintiffs quotations on the Type "S" five-light post of which the City had the said photograph, and also on the same post arranged for three-light and one-light, and in said letter the said City also enclosed a set of prints and specifications covering a design for the ornamental post which was afterwards manufactured by Gross Brothers, as alleged in the complaint, and the said City also asked the plaintiffs to quote their best figures on the said last named lamp post.

V.

Plaintiffs, in reply to the defendant City's letter of December 7th, 1911, on December 9th, 1911, sent to

defendant City the following letter:

THE INDEPENDENT FOUNDRY CO.,
Portland, Oregon.

Portland, Oregon, Dec. 9, 1911.

Eugene Water Board,

Eugene, Oregon.

Gentlemen: **Attention Mr. Alvin Meyers.**

We propose to furnish you ornamental street posts as per your specifications of Dec. 7th, 1911, and according to your drawings of your standard ornamental posts as follows:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Alternative quotations:

Approximately 92—3 light posts \$30.00 each

“ 8—1 light posts \$28.00 “

Also beg to submit alternative quotation on our type S post, of which you have photograph:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Or “ 92—3 light posts \$30.00 “

The following prices are based on delivery f.o.b. cars, City of Eugene, Oregon. The delivery could be made complete in 60 days on your standard posts and in 45 days on our type S post.

Trusting that we may have your order for same, we remain

Yours very truly,

Independent Foundry Co.,

Signed C. E. Grelle.

P. S. Cut of our type S—5 light post attached.

VI.

That on January 11, 1912, the plaintiffs sent defendant City a letter to the effect that they had made application for patent on their design of the Type "S" lamp post mentioned in the complaint, and that after having a preliminary search made they felt confident that their application would be granted, and that they would in that case protect their rights against infringement. That said letter of January 11, 1912, contained the first information that defendant City had that plaintiffs intended to apply for a patent for their Type "S" lamp post. That the plaintiffs had failed to mention to defendant City in any conversation or any of the letters mentioned, or at all, that they intended to apply for a patent for their said post.

VII.

That on or about the 13th day of December, 1911, the defendant City considered the proposal of plaintiffs to manufacture and furnish plaintiffs' lamp post Type "S", and also the lamp post designated by defendant City, and at said time considered the proposals of other bidders to furnish the lamp post designed by defendant City, and after a consideration of all of said proposals and bids the defendant City, on or about the 13th day of December, 1911, awarded the contract to furnish the required number of lamp posts as designed by said City to Gross Brothers, and on said date entered into a binding contract with said Gross Brothers to receive and pay for said posts.

VIII.

That pursuant to said contract the said Gross

Brothers commenced to manufacture said posts and had made all the necessary preparations therefor, at great expense, and had manufactured a number of said posts prior to January 2, 1912, and before plaintiffs had made any claim to defendants that their lamp post Type "S" was patentable or that they intended to apply for a patent for the same.

IX.

That the plaintiffs, by making a competitive bid to furnish the posts designed by said City, and by reason of the premises, licensed and permitted the defendants to manufacture and use said posts for the said street lighting system of defendant City.

That by reason of the premises the plaintiffs have abandoned their patent and the rights thereunder, so far as the same would interfere with the defendants in installing the lamp post designed by the said City.

That by reason of the premises the plaintiffs are and ought to be estopped from claiming or asserting any rights under said pretended patent that would be in conflict with the right of defendants to manufacture said posts and install the same for the said street lighting system of defendant City.

The defendant, City of Eugene, answering interrogatory No. 1, alleged in plaintiffs' complaint, alleges and says that it has not since the 12th day of March, 1912, caused to be made or delivered anywhere within the District of Oregon, or elsewhere, lamp posts substantially or otherwise embodying ornamental design of plaintiffs, or similar thereto, but the City of Eugene on or about the 13th day of December, 1911, entered

into a contract with Gross Bros. Iron Works, of the City of Eugene, for the manufacture of a five light lamp post designed by the Engineers of the said City of Eugene, and that said Gross Bros. Iron Works, pursuant to said contract manufactured ninety-two lamp posts; that the cost of said lamp posts to the City of Eugene was Thirty-four (\$34.00) Dollars for each post; but that the City of Eugene has not re-sold any of said lamp posts, and therefore, has made no profit thereon; and that said lamp posts manufactured for said City by said Gross Bros. Iron Works is not similar to, or substantially embodying the ornamental design of, the type "S" post manufactured by the plaintiffs.

The defendant City of Eugene, answering plaintiffs' interrogatory No. 2 alleges and says that the said City of Eugene has not erected, or is not maintaining or using therein, or furnishing light for any lamp post substantially embodying the patented ornamental design of plaintiffs, or similar therto.

The defendant, M. F. Griggs, answering interrogatory No. 3, says that the lamp post shown in photograph exhibit "B," attached to plaintiffs' complaint was erected adjacent to his premises at the corner of Fifth and Willamette Streets, Eugene, Oregon, by the City of Eugene, and the same is owned and controlled by the City of Eugene; that said defendant paid to the City of Eugene, for the actual cost of placing said post at said premises, which includes all equipment, the sum of Eighty (\$80.00) Dollars; and that the said amount has been paid in full; that the said post be-

longs to the City of Eugene, and the said City of Eugene maintains said post and furnishes the electrical energy for lighting the same at its own expense.

WHEREFORE, defendants pray that the bill of Complaint of plaintiffs herein be dismissed; that defendants have decree for their costs herein and such other and further relief as to the Court may seem just.

G. F. SKIPWORTH,
JOHN M. PIPES,
GEORGE A. PIPES,
Solicitors and Counselors
for Defendants.

[Endorsed]: Amended Answer. Filed May 14, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 7 day of July, 1914, there was duly filed in said Court, a Statement of Evidence, in words and figures as follows, to wit:

[Statement of Evidence.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and THE INDE-
PENDENT FOUNDRY COMPANY,
Plaintiffs,

v.

THE CITY OF EUGENE and M. F. GRIGGS,
Defendants.

CHARLES E. GRELLE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows on

Direct Examination.

A. My name is Charles Edward Grelle. 36. I am manager of the Independent Foundry Company. I reside in Portland, Oregon.

A. The Independent Foundry Company is a corporation incorporated under the laws of the State of Oregon, doing business in the City of Portland.

A. I am president and manager of the company.

A. Shortly prior to Oct. 1911 I had a visit from a Mr. Alvin Meyers, representative of the Water Board, of Eugene, Ore., looking into possible types of posts that they might favor in their installation at the City of Eugene; and I submitted such designs as I had for their consideration.

Mr. Meyers' visit was sort of preliminary. He was getting data and designs; had nothing definite in the way of being able to decide what posts he might want, nor how many he would want. I submitted such designs that I had been manufacturing for some time; also submitted a sketch of a new design that I had recently developed—hadn't yet finished the post of. This design seemed to appeal particularly to Mr. Meyers, more so than the other posts that I had pictures of. That was about all there was to the first visit.

I showed Mr. Meyers in the first case a preliminary drawing—the first drawing made to scale of my de-

sign. That was previous to the time that it had been put into a working drawing.

The design related to the picture of what we later designated as the "Type S" post.

Later I sent a photo or picture to Mr. Meyers at his request.

Later we had completed patterns, and made a post according to this original design. I had a photograph made of the post, and sent same to Mr. Meyers.

Defts. admit that photo attached to the bill of complaint is the photograph.

Plffs. exhibit A is here shown witness.

That is the cut I had made of the photograph submitted to Mr. Meyers of the post.

Later I received this letter from Mr. Meyers:

Marked "Plaintiffs' Exhibit B."

Eugene, Ore. 10/26/11.

"EUGENE WATER BOARD.

"Water and Power Utilities.

"Independent Foundry Co.,

Portland, Ore.

Gentlemen:

Attention Mr. C. E. Grelle.

Kindly send me photo and quotations of your latest design of ornamental street lighting post as per our conversation of Oct. 25." (In pencil, admitted to be part of the letter)—"soon as you get design complete."

"Yours truly, Alvin Meyers."

The conversation with Mr. Meyers was about a

week or ten days previous to this date.

In reply I wrote this letter marked "Plaintiffs' Exhibit C:"

"Portland, Oregon, October 27, 1911.

"Mr. Alvin Meyers,

Eugene, Oregon.

Dear Sir:—

We have your note of the 26th, and beg to say that we will be pleased to send you a photograph of the new design of street lighting posts just as soon as we can get the first post erected and photographed. We trust that this will be by the end of the coming week. We will then also be able to quote you price on same.

Yours very truly,

Independent Foundry Co."

The Independent Foundry Co. was given by me the exclusive license under this patent.

Q. Now, I will show you a carbon copy of a letter, and ask you to examine it and state to the court what it is.

Mr. GEISLER: No objection to this?

Mr. SKIPWORTH: I have no objection. I am willing to have all the correspondence go in.

Mr. GEISLER: You need not answer that question, because we have agreed between ourselves. I introduce in evidence as Plffs. Exhibit "D" which reads as follows:

“Portland, Oregon, Nov. 14, 1911.

“Mr. Alvin Meyers,

Eugene, Ore.

Dear Sir:—

We are enclosing you under separate cover a photograph of our new type of five light street lighting post. This is not a very good photograph due to the fact that it was taken on a dark and stormy day, but we had it taken so that we could send you a copy at the earliest date. This post will be a cheaper post than the five light post quoted you on previously, but we are at present not in a position to give you exact price. Should you decide on this type, we would be glad to make you our very best price.

In regard to the globe holders might say that the size of this globe holder could be readily changed to carry almost any size of series sockets. The base of this post has a hand-hole, which is not shown in the photograph and the foundation bolts are on the inside. The height of this post from base to top of top globe holder is 12 ft.

Trusting that you will find this new design attractive and that we may hear from you favorably, we remain,

Yours truly,

Independent Foundry Co.

By C. E. Grelle.”

Plff. next introduced by consent

“PLAINTIFFS’ EXHIBIT E,”

the reply of Mr. Alvin Meyers on behalf of the Eugene Water Board to the last mentioned letter:

“Attention Mr. C. E. Grelle.

Eugene, Ore. Nov. 21, 1911.

Independent Foundry Co.,

York St., Between 22nd & 23rd,

Portland, Ore.

Gentlemen:

Referring to yours of Nov. 14, The Eugene Water Board has requested me to ask you for your best quotation on your latest type of ornamental lamp posts, that is the round, fluted standard, of which you sent me photograph in yours of Nov. 14. It is desirable that these posts should be about one foot higher for our service.

Kindly quote us on five and three light posts.

We should also be pleased to know the size of glassware which you used at the time the photograph was taken.

The home foundries here are desirous of competing for this work, and we will probably get out a design of our own later, but should like your figures on this particular post, as close as you may be able to give them, so that we can decide whether or not it will be advisable to go to the trouble and expense of designing a special post.

Very truly yours,

THE EUGENE WATER BOARD,

By Alvin Meyers, Superintendent.”

Plff. next introduced the letter written by the Independent Foundry Company, plaintiff, to Mr. Alvin Meyers, of the Eugene Water Board, under date of November 27, 1911.

Marked "Plaintiffs' Exhibit F," and reading as follows:

"Portland, Oregon, Nov. 27, 1911.

Mr. Alvin Meyers,

Eugene, Ore.

Dear Sir:—

Yours of Nov. 21st at hand, and answer to same has been delayed awaiting the writer's return to the city. We are not yet in a position to quote you a fixed price on the new design of which we sent you a photograph, but can say that it will not be more and probably slightly less than the 5 light type B post, of which there are a few in your city. The 3 light posts will of course be slightly less in price.

In regard to the glassware used when we made this photograph; the lower globes are 6 x 12 and the upper globe is 7 x 16. In this connection will say that the globe holders may or may not fit a series socket that you contemplate using but the shape or the size of these could be changed from the size shown in photograph without a great deal of trouble.

In regard to the advisability of making up a new and special design, we trust that you will bear in mind that the cost of patterns on a post of this kind is a considerable item, and for a limited number, such as you will need for your installation, the cost of the patterns per post would necessitate the price on a special design being considerably higher than we could figure on this post of which we already have the patterns. Furthermore, in designing a post, we have had considerable experience in this line, and find that there is

a good deal of difference between the looks of a post on paper and a view of the finished and erected post, or a photograph of it. You will no doubt remember the sketch we showed you of our new design when you were in our office. We were pretty well satisfied with the sketch, but before we had the finished article in the shape that we wanted it, we made several decided changes, which probably are not apparent when comparing the photograph with the sketch as first made. We are sending you another photograph of this post in case you may have need of it.

We trust that this design will be acceptable to you, and that when you are ready to ask for quotations, we will be able to give you figures that will be satisfactory, and that will land the business. We trust the delay in answering your letter has not caused you any inconvenience.

Yours very truly,

Independent Foundry Co.,

By C. E. Grelle."

Plff. next introduced the reply of the Eugene Water Board, over the signature of Mr. Meyers, dated November 28, 1911.

Marked "Plaintiffs' Exhibit G," and reading as follows:

"Eugene Water Board

Water and Power Utilities.

Nov. 28, 1911.

Independent Foundry Co.,

Portland, Ore.

Gentlemen:

Yours of Nov. 27th received this morning.

We beg to thank you for the information enclosed, and are anxious to secure an exact quotation on this post.

Yours truly,

EUGENE WATER BOARD,

AM-BFD

By Alvin Meyers, Superintendent."

Plff. further introduced letter written by Independent Foundry Company in reply to the last letter of Eugene Water Board.

Marked "Plaintiffs' Exhibit H," and reading as follows:

"Portland, Oregon, Dec. 1, 1911.

Mr. Alvin Meyers, Supt.,

Water Board,

Eugene, Oregon.

Dear Sir:—

In reply to yours of the 28th, we figure that we could furnish these posts, as per the photograph sent you, for \$42.00 f.o.b. Eugene. You do not mention the number required, but we presume it would be between seventy-five and one hundred.

We trust that when you are ready to take competitive figures, you will give us a chance to put our quotation before you in a formal proposition.

Yours truly,

Independent Foundry Co.,

Dict. CEG.

By C. E. Grelle."

Signed in his absence by F. R. M.

Plff. further introduced a letter to Eugene Water Board from the Independent Foundry Company, under date of December 9, 1911, having attached there-

to a cut of the lamp-post designed by the plaintiff Mr Grelle.

Letter marked "Plaintiffs' Exhibit I," and reading as follows:

"Portland, Oregon, Dec. 9, 1911.

Eugene Water Board,

Eugene, Oregon.

Gentlemen:— **Attention Mr. Alvin Meyers.**

We propose to furnish you ornamental street posts, as per your specifications of Dec. 7th, 1911, and according to your drawings of your standard ornamental posts as follows:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Alternative quotation:

Approximately 92—3 light posts \$30.00 each

“ 8—1 light posts \$28.00 “

Also beg to submit alternative quotation on our type S post, of which you have photograph:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Or “ 92—3 light posts \$30.00 “

The following prices are based on delivery f.o.b. cars, city of Eugene, Oregon. The delivery could be made complete in 60 days on your standard posts and in 45 days on our type S post.

Trusting that we may have your order for same, we remain,

Yours very truly,

Independent Foundry Co.

C. E. Grelle.

P. S. Cut of our type S—5 light post attached.”

The last referred cut marked "Plaintiffs' Exhibit J."

Plffs. next introduced the letter written by the Eugene Water Board in reply to last letter. Such reply letter was marked "Plaintiffs' Exhibit K," and reads as follows:

"Attention Mr. C. E. Grelle.

Eugene, Ore. Dec. 14, 1911.

Independent Foundry Co.,

Portland, Ore.

Gentlemen:

With reference to your communication of Dec. 9, which embraced quotation on ornamental street lighting posts submitted according to drawings and specifications furnished by this office, beg to confirm our telephone advice to the effect that contract for these posts has been awarded to a local firm of this city.

We wish to take advantage of this occasion to express to you our thanks for your interest in the matter, and wishing you all possible success for the future, we remain,

Very truly yours,

EUGENE WATER BOARD,

By C. W. G."

Plffs. next introduced the letter written by the plaintiffs under date of January 11, 1912, to the Eugene Water Board.

Marked "Plaintiffs' Exhibit L," and reads as follows:

"Portland, Oregon, Jan. 11, 1912.

Eugene Water Board,

Eugene, Oregon.

Gentlemen:—

You are having manufactured at the City of Eugene, some street lighting posts according to your design. This design corresponds in numerous essentials to design of our lamp post, designated 'Type S' of which we enclose you cut. Some time ago, we made application for patent on this design, and after having a preliminary search made, feel confident that our application will be granted: in which case, we shall certainly protect our rights against infringement. We have notified the manufacturers, who are making your posts, to this effect.

Yours truly,

Independent Foundry Co.,

By C.E.Grelle."

Plffs. also introduced a letter of similar purport to Gross Brothers, who had the contract.

Marked "Plaintiffs' Exhibit M," and reads as follows:

Portland, Oregon, Jan. 11, 1912.

Gross Bros. Iron Works,

Eugene, Oregon.

Gentlemen:—

We understand that you are manufacturing for the Eugene Water Board some lamp posts according to the City Water Board's drawing. This drawing corresponds in numerous essentials to our design, designated as Type S, of which we are enclosing you a cut. Some time ago, we made application for patent on this design, and after having a preliminary search made, we are confident that patent will be allowed.

which matter will come up in the near future. We are advising you of these facts at the present time, for, if our application is allowed, we will certainly protect our rights in the matter.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

Plffs. further introduced two letters marked "Plaintiffs' Exhibit N" and "Plaintiffs' Exhibit O," sent by the Independent Foundry Company to Water Board, Eugene, Oregon, and Gross Bros. Iron Works, Eugene, Oregon, Plffs. Exh. N. reads as follows:

"Portland, Oregon, March 6, 1912.

Water Board,

Eugene, Ore.

Gentlemen:—

Kindly be informed that we have received notification from E. B. Moore, Commissioner of Patents, that our patent on our Type S post had been allowed, and that patent will be issued, dated March 12th.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

Plaintiffs' Exhibit O. reads:

"Portland, Oregon, March 6, 1912.

Gross Bros. Iron Works,

Eugene, Oregon.

Gentlemen:—

Kindly be informed that we have received notification from E. B. Moore, Commissioner of Patents, that our patent on our Type S post had been allowed and

that patent will be issued, dated March 12th.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

COURT: The contract was let in January?

Mr. SKIPWORTH: The contract was let in December.

Plffs. here introduced carbon copy of a letter sent by T. J. Geisler, Attorney for the Plaintiffs, to the Mayor and Water Board of the City of Eugene, Oregon, under date of March 14, 1912. Marked

PLFFS. EXH. P,

and reads:

"Portland, Ore., Mar. 14, 1912.

To the Mayor & Water Board of

the City of Eugene, Ore.

Gentlemen:—

I have been informed by my client, Mr Charles Edward Grelle, of this city, that you are about putting out lamp posts in the city of Eugene made by the Gross Bros. Iron Wks., of Eugene, Ore., which lamp posts are an infringement of the Design patented to Mr. Grelle the 12th inst. I enclose a blue print of the drawing constituting a part of said patent herewith for your inspection. I am also informed that there are slight, unimportant variations in the Design of your lamp post, but nevertheless the main features, and the effect produced, are identical with the design as patented.

Believing that the transaction referred to came

about inadvertently, and that you do not desire to wilfully infringe the patent in question, I beg to call the matter to your attention and ask you forthwith to make the proper arrangements, either with myself or Mr. Grelle, for obtaining a license on fair compensation permitting you to use his design. I have also written on the subject to the Gross Bros. Iron Wks.

Awaiting your early reply, I am,

Yours respectfully,

T. J. Geisler,

Attorney for Charles E. Grelle."

Plffs. also introduced as Plffs. Exh. Q a letter to the same purport to Gross Bros. Iron Works of Eugene, Ore.

Defts. admit that the letters mentioning having cuts attached to the copies did have cuts attached to them.

Examination of Witness Grelle continued:

Prior to making my application for patent on January 2, 1912, that is the first patent issued to me by the United States Patent Office, I had our attorney, Mr. Geisler, have a search made at the Patent Office to ascertain whether the design submitted was patentable. I was informed through Mr. Geisler and the Patent Office that it was.

Mr. GEISLER: For the purpose of showing what proceedings were had, I have the receipt for the application for patent and the final action in the case, and the notice of allowance, and I would like to introduce them in evidence.

They show that the application on Patent No.

42,283 was filed January 2, 1912, under serial number 669,112; that it was acted upon by the United States Patent Office Examiner January 19, 1912. It also shows action necessary for removal of informality; otherwise stating that the application was allowable. And on February 16, 1912, the formal notice of allowance in the case was issued. I will introduce this as one exhibit.

Marked "Plaintiffs' Exhibit R."

Plaintiffs next introduced the patent, dated March 12, 1912, which I have just referred to. I have not formally introduced it. (No. 42,283).

Marked "Plaintiffs' Exhibit S."

Plaintiffs also introduced the letters patent issued December 10, 1912, No. 43,338, as part of Plffs.

COURT: Do you claim that the five-light post of December 10, 1912, is a type "S" post as well?

Mr. GEISLER: Yes, your Honor. All relate to the type "S" post.

Exam. of Witness Grelle continued:

Handed two blue prints.

These are blue prints and specifications sent to me by the Eugene Water Board.

To bid on the posts.

Blue prints were received without objection, and marked "Plaintiffs' Exhibit U" and "Plaintiffs' Ex. V."

COURT: This has a square base and a square top?

Mr. SKIPWORTH: Yes.

COURT: But the arms are square and fluted?

Mr. SKIPWORTH: No, your Honor.

COURT: But the column is round?

Mr. SKIPWORTH: Yes, the column is round.

COURT: Who designed those posts?

Mr. SKIPWORTH: Mr. Meyers, of the Water Board, designed them.

Exam. of Grelle continued: Shown two other blue prints.

These are copies of our shop working drawings of "Type S" post.

They are exact copies.

Marked "Plaintiffs' Ex. W" and "Plaintiffs' Ex. X."

I graduated in mechanical engineering, and am familiar with drawings, mechanical drawings and with taking measurements of details for mechanical drawings.

Witness here shown Plffs. Exhibit Y.

This is an outline drawing of two posts, original design made according to scale from the working drawings, and an outline of the post submitted, to the same scale in fact, copy of the drawings submitted as "Plaintiffs' Exhibit V."

The one on the left is our "Type S" post, and that one on the right is a copy of "Exhibit V."

The copy of Exhibit "V" was made by taking the points on that exhibit, prick-pointing through onto the paper, so that it was an exact copy, without any alterations. The outline of the type "S" post was made from the working drawings, to the same scale as indicated on Exhibit "V."

I made these drawings and did the scaling. The scale was accurately applied.

Mr. GEISLER: I offer this in evidence, if the Court please, as showing to the court what the outlines of the two posts would represent; that is to say, the type "S" post, which is patented by the plaintiff, and the post which the defendant designed through its Water Board.

COURT: Do you offer that to show the similarity?

Mr. GEISLER: The similarity, yes, your Honor.

COURT: To show that they are practically the same post?

Mr. GEISLER: Yes.

Received without objection, and marked "Plaintiffs' Exhibit Y."

Mr. SKIPWORTH: That is a section right out of the center, isn't it?

Mr. GEISLER: We call it a profile or outline of the contour.

Plffs. further introduced "Exhibit Z," reading as follows:

"Attention Mr. Grelle. Eugene, Ore., Dec. 7, 1911.

Independent Foundry Co.,

Portland, Ore.

Gentlemen:

I am enclosing herewith a set of prints and specifications covering a design for ornamental posts desired for the city of Eugene. We would be pleased to have you give us your best quotations, as per the enclosed sheet marked quotations. You need not fill

in the quotations under 'one-half the total order.'

Kindly give me similar quotations on your type S, 5-light posts, also on the same post arranged for 3 light and 1 light.

It is quite likely that we will use the 5 light posts throughout, with a few 1 light posts. However, the alternative quotation is desired as it is possible we may use a 3 light post instead of the 5 light post. In this case the head for the post would be closed on two sides so that at any future time the other two arms might be installed.

As there is a meeting of the Eugene Water Board next Monday night I would be pleased to have your quotation on hand for that meeting. The order will probably be placed very shortly after the next Monday meeting.

Very truly yours,

Alvin Meyers, Supt."

This letter preceded the specific quotation which was written by the Independent Foundry Company to the defendants.

Q. Mr. Grelle, in order that there may be no misunderstanding as to what you meant when you said you drew these two sketches of the plaintiffs' and defendants' posts according to scale, but to the same scale, I wish you would explain fully to the court what you mean by that. I mean what you mean by saying the same scale.

A. In making a drawing of the defendants' post, which was submitted as Exhibit "V," that drawing is marked "Scale 1 inch equals 1 foot." I took their

drawing to be correct according to that scale, or course, and transferred from this drawing onto this drawing (Exhibit Y)—that is, from Exhibit “V” onto Exhibit “Y”; to get the Type “S” post to compare with the Defendants’ post, I used the scale of one inch to one foot, taking the measurements from the working drawings which have been submitted, and transferring them to the scale of one inch to one foot onto the drawing of Exhibit “Y.” That is, wherever there was twelve inches on the working drawings, that 12 inches was represented by one inch on this drawing, on Exhibit “Y”. There was no attempt made, of course, to make the dimensions of the two posts alike. This drawing is simply a representation on the same scale of the defendants’ drawing as shown on Exhibit “V” and our type “S” as shown by the working drawings.

I had some conversation, with regard to a notice of intention to prosecute the City of Eugene for infringement with a Mr. Svarverud, at Eugene.

Before taking this matter into the court, our attorney and I went to Eugene and consulted with Mr. Svarverud, the president of the Water Board. I personally asked him whether or not he had received our letters stating that we intended to take this matter into the courts, and also asked him to express his opinion on it—what his ideas were of our stand in the matter, as we had not had a reply to any of the letters of notification. Mr. Svarverud was rather indignant at our coming up to see him. After I explained to him that it was not a personal matter be-

tween himself and myself, but simply a matter of business, he stated that they had received this notification, but had no intention of paying any attention to it, and that if we wanted to take the matter into the courts we should do so. I believe his words were that he would "fight us to the last ditch." That was the only expression as to how the Water Board of the City of Eugene felt about the whole matter that we have received.

I don't recall the date of this conversation, but it was a very short time before we filed the complaint.

Mr. GEISLER: These are the photographs of the lamp-posts. I suppose you will admit those?

Plffs. introduced two photographs, one showing the post erected by the defendants in the City of Eugene in substantially front elevation, and the other one being taken somewhat at an angle.

Marked "Plaintiffs' Exhibit AA," and "Plaintiffs' Exhibit BB."

Defts. admit that these posts are erected, at the points indicated in the photographs, in the City of Eugene.

Plffs. further introduced as "Plaintiffs' Exhibit CC" a photograph taken of the plaintiffs' patented lamp-post from substantially a front elevation: showing the lamp-post in approximately the same position as the defendants' post is shown by the photograph "Plaintiffs' Exhibit AA."

Q. Mr. Grelle, please explain what, if any, difference it would make in the manufacture of posts if you had an outline before you such as shown on "Plain-

tiffs' Exhibit Y," whether you were told that it should be made square in cross-sections, or octagonal, hexagonal, or circular?

I mean in the method of manufacture, more especially what changes it would necessitate, whether you could keep the same outline or would have to change the outline by reason of making it circular instead of square, or changing from circular to square, or hexagonal or octagonal?

A. You could keep the outline exactly the same whether it was round or square or octagonal.

Q. State what preparations, if any, you made in your own shop—I mean, the shop of the Independent Foundry Company—with a view of manufacturing these posts.

A. After we had the working drawings, of course, we made patterns for the different parts, made flasks to make the molds in, made core-boxes to make the cores; and we had to do all of that to get ready to make the posts at all, before we made the first post, and then duplicated the flasks so as to make them in quantities.

Q. State whether or not that imposed upon you any expense in getting ready for this manufacture.

A. Of course.

Cross Examination.

By Mr. SKIPWORTH:

What relation do you say you bear?

A. I am president and manager of the Independent Foundry Co., a corporation.

Q. And you say the corporation has given you the exclusive license to sell and manufacture these posts?

A. No, I don't believe I said that.

Q. What did you say about that?

The Independent Foundry Company has the exclusive right and license to make and sell the type "S" posts.

Under the patent, they got that from me.

I claim to have invented and designed the post.

I also claim that the City of Eugene is infringing the patent on type "S", on your type "S" post.

Q. Now, that is the post that you claim that the city is infringing. Have you a patent for the type "S" post?

A. Yes.

Q. Will you please produce it?

Mr. GEISLER: It is in evidence here as Exhibit "S".

Q. Is Exhibit "S" the patent of your five-light post?

A. Yes.

Q. That is the patent you are claiming we are infringing?

A. Yes.

Q. Your exhibit "S" patent?

COURT: Is that a five-light post, Mr. Grelle?

A. Yes, sir.

COURT: That is a four-light that is shown there, but the other light is hid?

In this view, yes, sir. Directly at the post, at the front light, that is, this center light, these being at

right angles to it, the fourth light, in a direct straight line view, would be immediately behind that same globe.

Q. So the patent dated March 12, 1912, which is your Exhibit "S" represents the five-light type "S" post which you claim the City of Eugene is infringing? Is that correct?

A. Yes.

I had first a conversation with Mr. Meyers in reference to putting in the street lights for them in the City of Eugene.

A. I think that is shown in the testimony, according to the date of the letter, I think it was about November 26th or October 26th, about the date of that first letter. It refers in that letter to the conversation we had had the previous day. I had that conversation in Portland, with Mr. Meyers. This conversation I referred to in the letter. Afterwards I had a conversation with Mr. Meyers in Eugene with reference to the same matter.

Q. At that time Mr. Meyers exhibited to me the plans and specifications of a post which he designed. He also showed me the details. That conversation was probably a week or so before he sent the blueprints. Probably a week prior to Mr. Meyers' letter of December 7th to the Independent Foundry Company he advised me that he would enclose the prints and specifications covering his design for post. It was before I had made any competitive bids or submitted any prices to the city.

Q. Now, you didn't apply for your patent on this

type "S" post until about January 2, 1912?

A. No.

Q. When did it first come into your mind to apply for a patent on this post?

A. I had that in mind when I laid the post out.

Q. When did you lay the post out?

A. In September or October.

Q. Of the same year, 1911?

A. Yes.

Q. Now then, in any of these conversations with Mr. Meyers, and particularly at the time you examined his specifications of the post designed by him, you didn't tell him that you were contemplating applying for a patent on your type "S" post?

A. No.

Q. At the time you submitted the bid to the City of Eugene you did not tell the city that you contemplated applying for a patent on your post?

A. No.

Q. The first intimation that the city had, then, that you had applied for a patent was in January, about the 11th of January?

A. The date of my letter to that effect, yes.

Q. Yes, your letter to that effect. Now, that is the first advice you had given the city that you had applied for a patent or intended to apply for a patent?

A. Yes.

Q. Is that correct?

A. Yes.

Q. You submitted your bid to the city by letter dated December 9, 1911, and you applied for your

patent January 2, 1912. The city advised you that they had given this contract to a local firm, did they not?

A. Yes.

Q. Well, isn't it a fact, now, Mr. Grelle, that, being disappointed at not getting this bid, and after you had been advised that the bid was given to a local firm, you concluded you would apply for a patent on this post?

A. The action of the Water Board on that point hastened my applying for it. I didn't have any other need of making immediate application.

Q. Why didn't you advise the City of Eugene then that you intended to apply for a patent on this post?

A. That would not have been to my interest.

Q. That was the reason that you didn't advise them?

A. Yes, sir.

Q. Don't you think it was very much to the city's disadvantage not to know that you intended to apply for a patent?

A. None whatever.

Q. You permitted the city to let this contract for the manufacture of these lights, and you bid upon the contract knowing that you intended to apply for a patent on your post?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Why wouldn't it have been to your interest to advise the city that you intended to apply for a pat-

ent?

A. When I made my quotation to the city on the two types of posts, I put the figure so low that I felt it was almost sure to be let to me. I did not use any patent that I had in holding the prices on the post up. I made my figure on as low a competitive basis as I could afford to manufacture the post.

Q. You say in your bid: "We propose to furnish you ornamental street posts, as per your specifications of December 7th, 1911, and according to your drawings of your standard ornamental posts as follows: Approximately 92—5 light posts \$32.00 each." At the time you made this bid, did you then intend to apply for a patent on your post?

A. When I made my quotation?

Q. Yes, to the Water Board?

Q. Isn't it a fact you didn't intend to apply for a patent until after you were disappointed in not obtaining the contract for the manufacture of the city's posts?

A. If I had secured the contract for the posts as ordered by the Eugene Water Board I would have had the design of the type "S" post patented anyhow.

Q. When did you conclude that the post designed by the city was an infringement upon your type "S" post?

A. My opinion on that point was formed the minute I saw the design of the post.

Q. Did you advise the city or say anything to Mr. Meyers about that?

A. I answered that before by saying that I did not

think it was to my interest to do so.

Q. Well, you didn't do it?

A. No, I did not do it.

Q. You wanted the city to go ahead and manufacture these posts?

A. No, sir, I did not.

Q. Well, then, why didn't you tell them?

A. I gave the city notice that I did not want them to go ahead and manufacture those post.

Q. That was after the contract was let?

A. Yes, sir.

Q. And after these bids?

A. Yes, sir.

Q. Well, why didn't you do it before?

COURT: Was that after the Eugene people had manufactured the posts?

A. It was before they had manufactured any of the posts.

Q. It was after the contract was let?

A. After the contract was let, yes, sir.

Q. The contract was let on the 16th of December?

A. Yes, sir.

Q. And do you know when the city commenced to manufacture the posts?

A. I do not know definitely, no, sir.

Q. Well, do you know, as a matter of fact, that at the time the city received this notice the contract had been let, portions of the posts were completely finished, and all of them in course of construction?

A. I do not know that.

Q. You don't know that to be the fact?

A. No, sir.

Q. Now, then, in designing your post, did you design it from cuts of other posts?

A. No, sir.

Q. Isn't your type "S" post an infringement upon the "Cutter's Boulevard Post?"

A. I don't think so.

My conversation with Mr. Svarverud took place about December 2, 1912. Long after the city's posts had been manufactured and part of them placed upon the streets? I had no conversation with Mr. Svarverud about the time the contract was let. Nor any other conversation except the one which I have related.

Q. That took place about December 2, 1912?

A. That is all.

Q. Is that correct?

A. Yes.

I did not submit the plans and specifications of my post to the Eugene Water Board or to Mr. Meyers. I only submitted a photograph of my post. I showed Mr. Meyers the sketch that I referred to in my early testimony, and I sent him a photograph as per his request of the post that was represented in the drawing that I showed him.

Q. Well, how elaborate a sketch did you show Mr. Meyers?

A. A profile view.

Q. Just a profile view?

A. Yes, drawn to scale.

Q. Now, was the profile view that you showed Mr. Meyers similar to a view of that kind, although

it being your post?

A. It was a view taken in the same direction as this post is.

Q. And a similar view?

A. Yes, sir.

Q. That is what you mean by a profile view?

A. Yes, that is what I mean by a profile view.

Q. But you didn't show him any of the plans or details of your post?

A. What do you mean by details?

Q. Well, I mean the plans of your post similar to the details and specifications of the post that you introduced here of our post.

A. No.

Q. You only showed him a profile view and a photograph?

A. A photograph and the original drawing of the post.

Q. The original drawing?

A. Yes.

Q. That would show the post complete?

A. Yes.

Q. You didn't show any of its separate parts?

A. No.

Q. Now, then, you claim that the city's post infringes your type "S" post. I wish you would please explain to the court in what manner it infringes your patent or post. Explain in detail.

A. The drawing Exhibit "Y" outlines in a better way than you can by words showing the similarity between the defendant's post and our type "S" post.

The view shown is of the outlines of the post, and is what would be impressed upon the eye by the post as a whole, not looking into the details or the method of manufacture or construction. By referring to the drawing, the posts are similar in every respect.

COURT: Would that be the case if you saw those two posts standing on the street, and looked at them as they stood?

A. Unless you got in front of the post and examined the details of it.

COURT: Suppose you looked at them across the street?

A. It would make the same effect.

COURT: If the posts were standing side by side, would they have the same similar view that they have there in the drawing?

A. Yes, sir.

Q. Well, why do you say that, Mr. Grelle?

A. Because the effect upon the eye at a distance of across the street would be the same as though the thing were either silhouetted or a photograph were taken of the same on the same line, and the photograph neglected to show the application of details on the faces that come into view individually.

Examination by the Court.

Q. In that case, you would see the square face, wouldn't you? You would see the square arm?

A. I don't believe so, at that distance.

Q. Well, suppose you got close enough to see them, then, halfway across the street, or within ten

feet?

A. Unless you were examining the post to see whether that arm was square or round, the first impression on the eye would be the shape of it, that is, the lines of it, and not the cross-section of it.

Q. If you were walking down the street and the posts were alternating, would your eye take notice of it as you were going along, you being a drafter of such posts as that?

A. If I was going down the street and examining them, yes.

Q. Suppose you were passing along, curiously taking notice as you went along of the things that you passed, would the distinction present itself to you as you passed along?

A. I believe it would to me, Judge, although I don't think it would to you.

Q. I have an idea it would to me, because I take close notice of things.

A. Of course, being in this line, I examine all those things, and take more minute recognition of the details of those things than I would of some other things that I am not interested in at all.

COURT: I must say that I do not know as yet what the rule is in determining the distinction between the different types that might be patented, and how near the resemblance must be in order to be an infringement on the patent, but we will get to that later.

Cross Examination continued.

Q. Mr. Grelle, you don't pretend to say that a

casual observer wouldn't notice the difference between a square post and a round post, do you?

A. Well, that is rather indefinite.

Q. No, it isn't. You say now that the impression would be the same—the impression to the eye—half-way across the street or within ten feet it would be practically the same; it would make no difference whether the arms of the post were square or round?

A. Pardon me, I didn't say within ten feet the impression would be the same.

Q. What distance did you say the impression would be the same?

A. Across the street?

Q. Across the street?

A. Yes.

Q. Well, now, I wish you would observe this post—the base of the city post is square and paneled, isn't it?

A. I believe it is meant to represent square and paneled, although that drawing wouldn't indicate that it was either square or round.

Q. With a square base. That is not a round base, is it?

A. There is nothing on the drawing to prove that it is a round or a square.

Q. Well, you can see it with your eyes, can't you? You can see it is square?

A. No, I can't see it with my eyes. I have to use my imagination.

Q. I hand you a photograph of the city's post, and ask you to examine the base of it, and state whether or

not it is round or square.

A. It is square.

Q. Examine your Exhibit "A", which represents your post. It is round. Can you see any similarity between the base of the two posts?

A. Yes.

Q. In what way?

A. That they are approximately the same proposition. The outlines are very similar.

Q. Now, would those distinctions appear to the ordinary casual observer?

A. I think so, yes.

Q. Your post is round and fluted, isn't it?

A. Yes, sir.

Q. That is, the base of it. And the city's post is square and paneled?

A. Yes, sir.

Q. The city's post has a square base—foundation, you might call it, or molding around there? I don't know what you would call it technically.

A. Yes.

Q. Yours is round, isn't it?

A. Yes.

Q. Now, then, compare the arms of the posts. The arms of the city post are square, aren't they, with a panel in the center?

A. They are square, yes.

Q. And yours are round?

A. Yes.

Q. And the neck of your post is round, isn't it?

A. Yes.

Q. And the city's is square? Is that correct?

A. Yes.

Q. Now, then, examine this model here, which represents the top of the city's post. Compare the arms with the arms of your post, type "S", and state to the court in what way they are similar.

A. In what way they are similar?

Q. Yes.

A. The shape of the arms, in its projection from the body, from the head, is on the same lines as ours. It turns down to the globe-holder, which is practically the same shape. I don't believe I could show the difference in the bell.

Q. In what way do they differ?

A. They differ in that the cross-section of the arm is on a square instead of a circular and elliptical, and the curve of the arm just above the socket is somewhat sharper than the curve of the arm on my post.

Q. How about the panels on the arm of the post?

A. The panels and the square corners impress the eye with lines running in the same directions that the flutes give to the eye on my post.

Q. How about the neck of the post?

A. The neck of the post, the collar is in approximately the same position as they are on the type "S". They are square instead of being round.

Q. The neck of the type "S" post is round?

A. Yes.

Q. And the arms of the type "S" post are round, without any panel?

A. They are round and elliptical.

Q. How about this part, the top of the post?

A. That is what I considered the collar in my last answer.

Q. Is that part of the post round on yours?

A. That part is round.

Excused.

WILLIAM C. SCHMITT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is William C. Schmitt. My age is 27 years. My residence at the Multnomah Clubhouse. My occupation is an engineer. I am a graduate engineer, also conversant with drawing. Mechanical drawings, especially. I have seen these two blue-prints before, marked Plaintiffs' Exhibit "U" and "V" respectively. I have also seen these two blue-prints before marked "Plaintiff's Exhibits "W" and "X," also this drawing marked "Plaintiffs' Exhibit Y." I have checked over the outline and dimensions of the drawing marked "Plaintiffs' Exhibit Y" with the blue-prints, Plffs. Exhibits "U" and "V". I did it in the case of one by making—actually scaling with a compass, and found that all points corresponded as accurately as could be accomplished. In the case of the plaintiff's post I had to take the measurements from scale, and found that they corresponded to this drawing as accurately as could be done.

COURT: Both posts made from the same scale, do you say?

A. Made on the same scale, but there are certain dimensions that are different—the length, for instance.

COURT: Well, the arms?

A. I didn't compare the two of them one with the other. I merely compared each one with the original drawing for each one.

COURT: That indicated, then, that they came from the same scale, or made from the same scale, each post, with the exception of some difference as to base, etc.—length of base, etc.

A. Well, I don't know what scale this is drawn to. It is given on this original drawing as one inch to the foot. Now, the outline drawing here corresponds to that.

COURT: Is one a copy of the other?

A. Yes, one is a copy of the other.

Mr. GEISLER: I would like to say to your Honor that our object in having this drawing "Exhibit Y" prepared was to place both the plaintiffs' and the defendant's post before the court drawn to the same scale, which makes the comparison much more simple than if one was on a large scale and the other a small scale.

COURT: I understand. And Mr. Schmitt's testimony is only to verify the correctness of the drawings and the dimensions, that they were drawn to the proper scale as stated by Mr. Grelle.

Cross Examination.

Questions by Mr. SKIPWORTH:

I am a graduate engineer from Notre Dame Uni-

versity, South Bend, Indiana, graduated in 1910. I have worked several summers before I graduated as assistant to civil engineers, during the last two years I worked for several months for the Warren Construction Company, and for about one year and nine months I have been doing a great deal of work for Mr. Geisler.

I am in Mr. Geisler's office now.

Q. Now, referring to "Plaintiff's Exhibit Y," you have not run those to the same scale, have you? I mean by that, the identical scale on which the post is actually designed?

A. This plaintiff's post I have, but not the defendant's.

Q. As a matter of fact, the dimensions of the posts are not the same, are they?

A. I couldn't say about that.

Q. Did you ever measure the dimensions of the defendant's post?

A. No, sir, I have not.

Q. Have you ever measured the dimensions of the plaintiff's post?

A. Yes, sir, I have, as detailed in these blue-prints.

Q. Well, have you the defendant's post detailed in the blue-print?

A. No, sir, I have not.

Q. That doesn't show a completed post, does it?

A. It shows an outline drawing.

Q. What do you mean by outline? Define that.

A. An outline would be merely the outside lines of a figure, without respect to any detail inside of

those lines.

Q. It would be very easy to enlarge the post of the plaintiff to the dimensions of the defendant's, or reduce the defendant's post to the dimensions of the plaintiff's post, in your outline?

A. It would not and keep the same—when you reduce you have to keep all parts in the same proportion.

Q. That doesn't show the post completed?

A. It doesn't show the inside detail.

Q. Nor doesn't show the outside truly, does it?

A. Yes, it shows the outside lines.

Q. Now, referring to the plaintiff's post, the defendant's post which is shown by Plaintiff's Exhibit "U" there on this exhibit, the base is shown to be square?

A. Well, that is not shown to be absolutely square.

Q. It is not round, is it?

A. Well, that could be round from this view. It would require another view to show that that is square.

Q. If this post is square, then what would you say as to this being a fair representation of the defendant's post?

A. That is a fair representation as far as our plans go.

Q. If the post of the plaintiff is round, then what would you say as to Exhibit "Y" being a fair representation of the plaintiff's post?

A. Well, as far as our plans go, because you could not tell from these drawings whether those two bases

are round or square.

Q. You couldn't tell from the drawings whether the bases are round or square, could you?

A. No, sir. They could be either.

Q. You couldn't tell from the drawings as to whether or not the arms are round or square?

A. No, you couldn't.

Q. They could be either?

A. Yes, sir.

Q. You couldn't tell from the drawing as to whether or not the neck is round or square?

A. No. They wouldn't be restricted to being round or square; they could be of any shape.

Q. And you cannot tell from the drawing as to whether the bases of the posts are paneled or not, can you?

A. No.

Q. Then, from those drawings it would be impossible to tell the view of that post, or the appearance to the eye, if completed?

A. The general outline. You wouldn't be able to get any idea as to the panel work, or the fluting, or any of the details?

Q. Or how the post would look after completed?

COURT: That post has panel-work at the base. Doesn't that show square?

A. Well, that wouldn't necessarily have to be square, because a round base could have a design so that a frontal elevation of it would show up exactly the same.

Q. Now, referring to the post on this Exhibit "Y,"

you cannot tell from the drawing how the post would look if completed?

A. Only as far as general outlines go; not as far as details.

Q. Or appearance?

A. Well, that would depend upon what appearance, what would constitute appearance, some.

Q. Now, referring to the defendant's post, you say the base could either be round or square?

A. From these drawings it could be any shape at all.

Q. From these drawings, yes. Then I say, you cannot tell from these drawings how the post would look if completed?

A. No, not as far as details go; only on general lines.

Redirect Examination.

Q. For the information of the court, I would ask you, Mr. Schmitt, given any outline of a figure, to state whether it would be possible, in developing that figure later on, to make it square, octagonal, hexagonal, circular, or any other form in cross section, and whether or not the outline would in any way vary?

A. No, sir, the outline would not vary.

Excused.

Plaintiff rests.

Mr. GEISLER: I have not introduced any evidence at this time in regard to possible profits and so on, as I assume that will come in afterwards, when it is determined whether or not the infringement exists.

COURT: Very well.

DEFENDANT'S EVIDENCE.

Y. D. HENSILL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I reside in Eugene, Oregon; I am an architect.

A. I have been an architect about 23 or 24 years—24 years—practicing.

Q. In connection with your work as an architect, are you skilled in the work of designing?

A. We have a good deal of designing to do.

Q. Have you ever taken any training in any school?

A. I had two years training at Oakland High, and nearly two years at Berkeley. I am actively engaged in my profession at the present time.

I have seen the lamp-post put up by the City of Eugene, the post that is in dispute here, the one that was manufactured by Grosse Brothers.

I am not familiar with the "Type S" post that the plaintiff in this case claims to have patented.

Q. Will you please examine the type "S" post, and say if there is anything new or novel in the design of that base to that post; if that is known to designers—has been; if that is a recognized design among architects and designers?

A. There is nothing unusual about it.

I think I have observed other lamp-posts quite sim-

ilar.

There is nothing new in fluted columns, these have been used long before lamp-posts were.

A. I think I remember fluted lamp-posts when they were used in connection with the old gas lamp-post, gas lights, before electric lights were used.

These fluted columns have been used in buildings for a good many hundred years.

Q. Now, will you examine the photograph of the city's post, and explain to the court, from the designer's standpoint, the difference between the two? You can take this for the city's post, the profile.

Mr. GEISLER: That is not in evidence yet.

Mr. GRELLE: That is Exhibit "B".

A. There is a perceptible bit of difference in the two posts.

Q. In what respect, now, commencing at the base?

A. One has a square base, with very little sub-base or moldings on the base. The other is more ornamental. One base is square with square panels.

Q. Say "Type S" and "the city's" to designate the different posts.

A. The type "S" post has a round base, with more moldings than the city's post. The type "S" post has a fluted base. The city's post is square, with a square sunk panel. The type "S" post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type "S" post has a round cap or head. The city's post has a square, with sunk panels. Type "S" post is ornamental. There is a difference in the shape of the arms. One is round—the type

"S" post is round, increasing to elliptical, while the city post, the city arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm.

Q. Well, would the top of that post present any difference to an ordinary observer?

A. I believe it would to a casual observer.

Q. Well, would it to an architect or designer?

A. It surely would.

Q. For quite a distance?

A. Yes. It looks like most any one could see the difference in the post in looking at it, because there is a difference in looking at the perspective of a square or rectangular column or post and looking at one that is round.

Q. Do you think that difference would be perceptible as far as across the street?

A. I do.

Q. Have you noticed any lamp-posts that are similar to type "S," as much similar as the city's lamp-post?

A. I think they are somewhat similar right here except the base.

Q. Right here in Portland?

A. Lower base.

Q. As a matter of fact, all lamp-posts have to resemble each other to a considerable extent, don't they, from the nature of things?

A. Yes. All lamp-posts have a base and a shaft. There is a little difference in the head or the shape of the arms, perhaps.

Mr. PIPES: I will offer in evidence the "Cutter's Boulevard Lamp-post" for comparison.

Marked "Defendants' Exhibit 1."

Q. I hand you Defendants' Exhibit 1, which is a cut or photograph or representation of Cutter's Boulevard Post, and ask you to state if there is as much similarity between that post and type "S" as there is between the city's post and type "S", and to point out some of the similar features.

A. There is more similarity between Plaintiff's Exhibit "CC" and Defendants' Exhibit "1" than there is between Exhibit "CC" and the city's post.

Q. In what respect?

A. The bases in these two posts are round. There is little fluting on the base of Exhibit 1, the same as the base of Exhibit CC. The bases are apparently about the same proportional height. The shafts of both columns are round and fluted. The arms are similar. Exhibit 1 seems to be elliptical and round. There are more moldings under the socket supporting the light on Exhibit 1, similar to Exhibit CC.

Q. Well, now, just from the standpoint of a casual observer, would you say that there was as much similarity between the Cutter's post and Plaintiffs' type "S" as there is between the Cutter's post and the city's post?

A. There is more similarity between these two.

Q. Well, supposing the city's post is an infringement on the plaintiffs' type "S", what would you say about the Cutter's post also being an infringement on it?

A. I would say one of this would be nearer an infringement on the other than that would be to type "CC" or to Exhibit "CC."

Panel work in designing, has that been recognized for years?

A. It is an old design.

Q. And this elliptical shape for arms, is that a new design?

A. I don't think so.

Q. Is there anything new or novel about any of these lamp-posts, from the designer's point of view, considering the state of the art?

A. I don't see anything unusual or novel about any of them.

Q. Those are all well recognized figures that have been used and it is just simply the combination that makes the difference? Isn't that a fact?

A. The combination makes the difference. They all have foundation, base and shaft, and the arms and the head.

Q. And all lamp-posts in use are constructed practically that way? Isn't that a fact?

A. A very similar way.

COURT: How long is that Cutter's post supposed to have been in use?

Mr. SKIPWORTH: Two years, your Honor, according to the deposition.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Hensill, are you at the present time in any

way officially connected with the City of Eugene?

A. I am a councilman at the present time.

Q. You haven't made a specialty of designs on lamp-posts, have you?

A. No, sir.

Q. Now, when you speak of the dissimilarity as between the plaintiffs' patented lamp-post and the defendants' lamp-post, and the city's, you have in mind the details, do you not?

A. No, the general appearance of the post.

Q. How about the outline? To assist you in answering that question I have placed before you a sketch which is in evidence as Plaintiffs' Exhibit "Y." The drawing on the left-hand side represents the plaintiffs' lamp-post, that on the right the defendants' lamp-post as erected in the City of Eugene. I would ask you to look over the outline carefully, and state whether it is not a fact that the outline is substantially the same in the two posts.

A. They are quite similar except the base.

Q. Now, is it not a fact, with a given outline, I could say to you, "Mr. Hensill, I want that reproduced in square, or in octagon, hexagon, circular, or elliptical, and you could design a lamp-post to be manufactured from that outline in each case?"

A. Yes.

Q. Now, is it not a fact that there is considerable variation in ornamentation which is imposed upon an outline of any kind? Take, for example, a house may have the same outline, and yet the details with regard to ornamentation may be infinitely varied, may

they not?

A. Yes.

Q. Mr. Hensill, you are acquainted in the art of design with what is known as the classic arm, are you not?

A. I don't know whether I know exactly what you mean by a classic arm.

Q. Well, I will give you an example of one here. I believe you call it a console, do you?

A. Yes.

Q. That is the name, I believe, the architects use. But what I had reference to as a classic arm was, for instance, one as sketched here at the left hand side of that sheet of paper, the upper left hand corner, Mr. Hensill.

A. It would depend on what style you were designing it in.

Q. Well, I mean, that is one type of classic arm or console, isn't it? It goes back to the old classics.

A. Yes.

Mr. GEISLER: For the purpose of having the witness' testimony clearer, I am going to offer the top of that sheet in evidence. I will offer the whole thing.

Marked "Plaintiffs' Exhibit DD."

Q. The usual way that such a figure is drawn is by scrolls at both ends, is it not, as, for instance, shown in the upper left hand figure here?

A. Not necessarily.

Q. Well, I mean that is a very common way of producing it, is it not?

A. There is nothing unusual about it.

Q. No, I say it is not unusual; that is a very common way, to the contrary, isn't it? This one right here, the upper left hand corner?

A. Yes, it is seen quite often.

Q. Surely. Now, refer to the upper left hand corner of that same sheet of paper, and we see a design which is also substantially what I have termed a classic arm, or console? Isn't it?

A. Well, it is not as complete as the first.

Q. Not as complete as the first; and the reason of its lack of completeness is by reason of the omission of the scroll at the right hand end?

A. Yes.

Q. Now, I would call your attention to Defendants' Exhibit 1, and ask you to examine that photograph. Now, is it not a fact that the arm there shown of that lamp-post is on lines as suggested by the classic arm or console, such as we have just referred to?

A. It is similar to one of them.

Q. The one it is similar to is the one at the left hand upper corner of that sheet, which has the scroll at one end omitted?

A. Similar to that, yes.

Q. Now, do you mean to say to the court that there is identity between the arm as forming a part of the post, of the plaintiffs' lamp-post, and the classic arm shown by Defendants' Exhibit 1?

A. There is a similarity, except where the console leaves the head of the post.

Q. It appears in evidence, according to your state-

ment, that Defendants' Exhibit 1, of a lamp-post previously existing, has arms which in their contour follow the classic type of scroll or classic arm, whichever it may be. You agree to that, don't you? That in other words, the lamp-post here of Defendants' Exhibit 1 has arms which are suggestive of the classic type?

A. Yes, there is a suggestion of the classic type in the shape of that.

Q. Now, then, the classic type that I have in mind at this time is that which has the scroll on both ends, or its modified form as shown in Defendants' Exhibit 1, where the scroll at one end, at the extremity of the arm, is omitted. Now, do you mean to tell the court that the classic arm is suggestive of the arm employed by the plaintiff in his patented lamp-post?

A. The shape is similar.

Q. Is there anything classic about it?

A. The shape is similar to the arm in this post. It is not quite so ornate. It depends on what style you are designing. There are several classical styles.

Q. Yes, but I have reference to this one particular classical style, and I want to know whether, as a matter of fact, the arm of this lamp-post, it being admitted here in evidence that it is of the classic arm type, would in any wise suggest this one here.

A. With the ornamentation that is used on that, fluted, and with the brace here, there is a little suggestion of classical to that.

Q. A little suggestion. Well, is the suggestion that you find merely because of the intermediate por-

tion or the middle portion of the arm between the two scrolls being shown here? Is that what you have reference to when you say there is a little suggestion—just this portion here between the root and the extremity?

A. The suggestion is the ornamentation that surrounds this console or arm similar to the ornamentation on that.

Q. I don't care anything about the ornamentation, Mr. Hensill. What I want to get at is the outline. Here we have, I am referring to a classic arm, one that has a middle portion with a scroll at one end, that we say we know to be of a classic type; and in this lamp-post it was followed here by the persons who designed this Defendants' Exhibit 1, and we find that the scroll at the extremity of this classic arm or console is omitted, is it not?

A. The scroll is omitted on Exhibit 1.

Q. Yes, the scroll is omitted. Now, is there anything which the classic arm would suggest with regard to the plaintiffs' design except the middle portion; that is to say, the portion between the two scrolls at the ends, the outline of it, mind you? Do you understand?

A. I am not clear what you are trying to get at now.

Q. Well, you say there is a little similarity. Now, where is that little similarity to be found?

A. In the shape of the console from the point it leaves the head here to the socket here, in the shape.

Q. In the mere fact that it is making a little curve

there?

A. It has that irregular curve and drop similar to this.

Q. That resemblance is a very slight one to the classic production of an arm such as I referred to a moment ago, is it not?

A. Very slight.

Q. It is an incomplete one?

A. The comparison is slight.

Q. Now, then, the fact is, however, Mr. Hensill, that the plaintiff's type of post as an outline is suggestive of the defendants' outline of post, is it not?

A. Merely in the outline.

Q. In the outline, yes. That is all.

Redirect Examination.

Q. Is the outline of the post as represented there any fair representation of the finished post?

A. No, sir.

Q. Wouldn't the outline of any post necessarily be very similar?

A. The outline might be very similar, because the outline shows no ornamentation, and the finished post be very different.

A. E. DOYLE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I am an architect. I live in Portland.

Q. Have you done any work in Portland?

A. Some.

Q. Where have you worked here?

COURT: I don't think you need qualify Mr. Doyle. He is an architect here of standing in the community.

In connection with my work as an architect, designing is a part of my training.

Q. I hand you pictures of the city's post and of the plaintiffs' post, and ask you to state where they differ, in what respects.

A. Have you a photograph of this one, so that you can see them together? One is a drawing, one is a photograph. It is rather difficult to compare them intelligently that way.

(Witness is handed small photograph.)

Mr. SKIPWORTH: This is the plaintiffs' post and this is the city's post.

Will you please look at the photograph of the city's post and of the plaintiffs' post, and describe the difference between the two posts?

A. One post apparently has most of the parts square, and the other seems to be round. One is a considerably better designed post than the other.

Q. Which one is the best?

A. This large one. That is the Plaintiffs' Exhibit "E." The other looks like a poor imitation.

Q. The defendants' post?

A. Really, yes. It is square.

Q. You say the plaintiffs' post is the best design?

A. Yes, I should say so decidedly.

Q. That is from an artistic standpoint?

A. From an artistic standpoint decidedly.

Q. Would a person likely be deceived by the city's post if he wanted to purchase—

A. Any one with any artistic discrimination at all would.

COURT: Would be deceived?

A. Decidedly so, I think.

Q. You don't understand the question, do you?

A. Would be deceived between one and the other. Well, if I was contracting to buy that post, I would certainly not be deceived if I got this one.

Q. Well, that is what I am trying to get at. You would know the difference between the two?

A. Yes, decidedly so.

Q. Well, do you think that that difference would occur to a man who was not so skilled as yourself, to a casual observer, the difference between a square and a round post?

A. Yes, I should say the average person would notice a difference. As you look at it, the longer you look at it the more things about it you see that are different.

Q. Have you seen the posts—the full sized post?

A. I have not.

Q. This is a representation of the top of the city's post—a true representation—that you see before you here. You might compare that with the photograph of the plaintiffs' post, and say whether there is any similarity there that would be likely to deceive the public.

A. There is a similarity, but they are not at all

the same, if there is a distinction.

Q. Isn't there a similarity between all lamp-posts to a certain extent?

A. Yes.

Q. That must necessarily be, mustn't it?

A. No, not necessarily. One could have one light.

Q. You have a base and column and a top in all of the lamp-posts, don't you?

A. Yes, but you don't have arms on all lamp-posts. It is not necessary to have a similarity, but there is a great similarity between most public light and street posts.

Q. Between most street posts?

A. Yes.

Q. Well, now, the fluted column that you see there in use in both of these posts, is that a novel and original design, or has that been known to your profession for some time?

A. Yes, there is nothing original about that.

Q. How long has that been known to architects and designers?

A. Oh, I might say two thousand years.

Mr. GEISLER: I might say we claim nothing for the details.

Q. There is nothing very original in either one of those lamp-posts, is there?

Mr. GEISLER: I object to that question. I don't care—I think the witness' answer would be just as good to us; but I don't want to get into this loose way of examination.

Q. Well, I will ask you if there is anything novel,

or new, or original in either one of those lamp-posts, from an architectural and designer's standpoint?

Mr. GEISLER: I will object to that, too, unless you follow it up and show on what the witness bases his opinion.

COURT: He can answer that generally, and you can examine into details if you like.

A. I shouldn't say there was anything particularly novel or original. It is along lines that posts have been designed for a good many years.

COURT: I suppose you are aware that combinations are the subject of patent as well as original designs.

Mr. PIPES: Yes, I am.

Q. Is there anything new or novel in the combination of plaintiffs' post?

A. Oh, I suppose that is a question where you draw the line as to what is new or novel. They are new combinations—there are combinations that I have never seen before.

Q. In the paneling on the city's post, is there anything new about that?

A. No. That is, there is a square base on the city's post, and a round fluted base on the other one.

Q. Well, do you think that the plaintiff would be in any danger of competition by such a post as you say the city's post is?

A. Not with me.

Q. Well, with the public?

A. Oh, I cannot answer for the public.

Mr. GEISLER: I object to that. I don't see how

the witness can testify to the public. He can state what he knows himself, and what he thinks; but that is a great big body—the public.

COURT: He is an expert. He can state his opinion.

Mr. GEISLER: Yes.

Mr. PIPES: Well, I think that is all.

Cross Examination.

Questions by Mr. GEISLER:

You heard the examination by myself of Mr. Hensill when on the stand, in regard to the outline?

A. Yes, sir.

Q. Differences in details?

A. Yes.

Q. What I said about classic arm and console and so on, and what he found to be similar and dissimilar? Do you remember that, Mr. Doyle?

A. Yes, sir.

Q. Do you agree with his statements about that?

A. Well, it seems to me it would require quite a stretch of imagination to see anything classic in that. I would not ever think of it unless it was suggested to me.

Q. Not in the plaintiffs' post?

A. In either one.

Q. Yes, in either one. I agree with you there. But now to you, in these two outlines, Mr. Doyle, is the one suggestive of the other, in your opinion?

A. Yes, of course, they look very similar in outline.

Redirect Examination.

Q. Well, would the outline be a fair representation of the similarity in the finished post?

A. No, I hardly think so. It is not a fair test.

Q. It is not a fair test?

A. No.

C. W. GELLER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SKIPWORTH:

I reside in Eugene, Oregon. My occupation is secretary of the Eugene Water Board, since approximately April 1, 1912.

Q. Are you acquainted with Mr. Grelle, the plaintiff in this case?

A. I am not personally acquainted with him, any more than I have seen him in the office.

Q. Has he been in the office of the Water Board in reference to his lighting post?

A. Yes, sir.

Q. Did he ever meet the Water Board as a body in reference to placing his type "S" post in Eugene?

A. Not to my knowledge.

Q. You may state whether or not the Eugene Water Board asked for bids or quotations for the manufacture of the light post which was designed by the city.

A. The Eugene Water Board asked for quotations from various firms, Mr. Grelle's firm being one to

which the request was sent.

Q. And you may state whether or not the request was also sent to other persons?

A. (Referring to record) There were four—four firms.

A. Albany Iron Works, of Albany, Oregon; The Eugene Iron Works, or George W. Frazer, of Eugene, Oregon; The Independent Foundry Company, Portland, Oregon; and Gross Bros., Eugene, Oregon.

Q. You may state whether or not the Water Board met and considered these bids.

A. They did, at a meeting specially called for this purpose.

Q. And you may state whether or not the contract was let for the manufacture of the posts.

A. It was.

Q. The post designed by the city. Can you give the date that the contract was let?

A. The Board met on December 12th, 1911, and authorized the President of the Board and Mr. Meyers, the superintendent, to enter into a contract with Gross Brothers. I believe the contract was actually entered into next day.

Q. Have you any means of determining the exact date the contract was entered into?

A. The contract was actually entered into on the 16th day of December.

It was entered into in writing, in duplicate.

The contract was signed on the 16th day of December, 1911, by the respective parties.

To the best of my knowledge, Gross Bros. com-

menced to manufacture, I believe the same day that they were notified that they would be awarded the contract; in other words, prior to the actual signing of the contract.

Q. Do you know when the construction of the posts was completed?

A. To the best of my recollection at that time, the work was of such a nature that practically certain portions of the posts were started first. If I remember correctly, the columns were cast, and then perhaps later on the bases and the heads. And you might say that a good deal of the work was pretty well along towards completion in the early part of January. In fact, they had one post set up for inspection. This inspection was conducted by the Water Board and superintendent very early in January—I think perhaps prior to the 10th, or even the 6th or 5th.

Q. Do you remember how many of the posts were completely manufactured prior to January 11, 1912?

A. I have no definite knowledge of that, excepting that I know that there were numerous parts—columns and bases and heads—lying about the works of Gross Bros. at the time that we made that first inspection. It seemed to me there were perhaps 20 or 30 posts lying around there in various stages of completion. In fact, as time went on, they crowded us to take delivery of them, because their shop room was crowded.

Q. And did the city take delivery of the posts from time to time as they were manufactured?

A. Yes, sir.

Q. How many posts did Gross Bros. manufacture for the city under their contract?

A. The contract called for two type posts. One was a five-light and the other was a one-light post. Of the five-light there were contracted and completed 92; of the one-light 15 posts.

Q. Now, then, was the bid of Gross Bros. for the manufacture of the five-light post in excess of the bid of the plaintiffs?

A. Yes, sir, it was.

Q. How much?

A. On the five-light post it was \$2.00. In other words, plaintiffs' bid or quotation was \$32, while Gross. Bros. was \$34.00.

Q. Why was the contract let to Gross. Bros. and not to the plaintiffs?

A. There are two reasons for that. As I testified, there were two types of post contracted for and built. One was the five-light and one was the one-light. While Gross Bros.' bid was \$2.00 higher per post on the five-light, their quotation on the one-light post was \$5.00 cheaper; so taking the fifteen one-light posts and the 92 five-light posts, there was but a difference of, I believe approximately \$109 on the total order, which the Board would well consider being worth retaining the business at home, subject to home inspection and patronizing home industry.

Q. State whether or not the Water Board took that phase into consideration in letting the contract.

A. Yes, sir.

Q. And what was said about it, if anything?

A. As near as I can recall, that, being the sum total was so close, it was a good deal more advisable to award it to the home industry, for the reasons I have previously stated. That may not be the exact language they used, but it is the sum and substance of it.

Q. You may state whether or not the Water Board desired to inspect the post during the construction?

A. The Water Board, through its superintendent, did, yes.

Q. Was that matter discussed, and if so, what was said about it?

A. I don't recall in exact words, but, to the best of my knowledge, it was that that would be an advantage.

Q. That was discussed at the meeting of the Water Board?

A. I think that it was.

Q. Now, what was the whole contract, or how much was the whole contract price of manufacturing the posts?

A. \$3473.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Geller, do you remember the Water Board receiving a notification from the plaintiff of his intention, or his having applied for patent?

A. I do.

Q. What action was taken upon that notification?

A. No special action of any kind.

Q. Was it considered in any way by the Board?

A. Why, it was brought to the attention of the Board, and discussed, you might say, informally. The opinion seemed to be that there was nothing in it—merely that Mr. Grelle was disgruntled, bitter, and perhaps would seek to use that means to thwart the city in its efforts.

Q. You have got the minutes there, have you, of the Water Board?

A. Yes, sir.

Q. Is it referred to that it was received, in the minutes of that day?

A. No, there is no reference in the minutes to that communication.

Q. It was not put down in the records at all?

A. As a rule, communications are not.

Q. Do you remember of receiving later on a notification of the plaintiff that his patent had been allowed?

A. Yes, sir.

Q. What action was taken upon that?

A. Merely filed.

Q. After you got the final notification, that you got from plaintiffs' attorney, what action was taken on that?

A. Which one do you mean as final?

Q. The one in which you were advised that the patent had issued, and you were told that the city was an infringer of that patent?

A. My recollection now, without referring to the correspondence, is that you people had made an ap-

plication, and to the best of your knowledge you expected to obtain a patent.

Your early communications stated that if your patent was granted you would hold us responsible.

Q. How many light-posts are there in operation at the present time, of the five-light type?

A. I think there are fifty; very close to it.

Q. And you then have material on hand going to put up 42 more?

A. Yes.

Q. That makes the 92?

A. Yes, sir, provided my figure of 50 is correct. I am almost certain it is correct.

Q. Have you a record of when the first post was complete and in public use on the streets there in Eugene? I don't mean any sample posts now. I mean the actual post.

A. No, I have none with me; but I think I have in my office.

Q. I didn't understand that answer.

Q. Have you any record here of the dates of the payments made to the Gross Brothers on this contract?

A. Yes.

Q. Will you kindly give us the dates and amounts of the payments?

A. The first payment, in other words, the first warrant was drawn in favor of Gross Bros. Iron Works March 12, 1912, for \$849.80. I might state in explanation that this warrant also covered an item for other merchandise and labor as well as ornamental

posts. It did not amount to so very much. The second warrant was drawn April 8, 1912, for \$1226.50. That was also for various items. The bulk of it was for ornamental posts. The third and last payment was made May 14, 1912, the amount being \$1410. I believe that was entirely for ornamental posts. I don't think it included any other merchandise or labor. I am not positive as to that now.

Q. Have you a copy of the contract here that was entered into between the City of Eugene and Gross Brothers?

A. I have our copy, yes, sir.

Q. You have it here?

A. Yes, sir.

Q. Will you allow me to see it?

A. Yes, sir.

Mr. SKIPWORTH: We will offer it in evidence if you like.

Mr. SKIPWORTH: At this time the defendant City of Eugene offers in evidence contract between Gross Bros. Iron Works and the City of Eugene for the manufacture of the posts designed by the city, together with the details and specifications attached to the contract.

Marked "Defendants' Exhibit 2."

Q. Could you tell me by looking at your records, Mr. Geller, how many lamp-posts were completed and erected on March 12, 1912, when this warrant for \$849.80 was drawn?

A. The warrant of March 12th was drawn on the basis of the estimate made March 1, 1912, and prior to

and including March 1, 1912, Gross Bros. had completed and we had taken delivery of thirty five-light posts. I mean by that, that perhaps every week we would go down there and take delivery of some posts, in order to give them shop-room. In fact, they annoyed us quite a bit at times by wanting us to get them out of there.

Q. Can you tell us how many lamp-posts were erected prior to March 12, 1912?

There were none on the streets of Eugene at that time.

Q. Did I understand it was based on estimate of February 1st?

A. March 1st.

Q. Have you got any estimate as to February 1st with respect to this contract with Gross Bros. as to work then completed?

The first estimate was made on February 1st. We perhaps knew prior to that how they were coming along, and how they were progressing.

Q. Had you any estimate made January 1st as to how far the work had progressed on the contract?

A. No estimate made with reference to the payment.

Q. What estimate did you make?

A. Well, as I have stated before, we possibly knew, and did know—our office did—from time to time how they were progressing, and how many they had turned out and were turning out.

Q. You mean by that, that you knew they were getting along with the work, but you hadn't any defi-

nite knowledge as to how far it had progressed?

A. Well, at that time we undoubtedly did, because our engineering force was inspecting it constantly once, or more possibly, a week.

Q. You didn't go with them?

A. I did not, but one or two times.

Q. Well, did you go down to the Gross Bros.' shop at January 1st?

A. I don't think I did on January 1st. I did a few days thereafter, at the time the Water Board went down.

Q. What did you find at that time?

A. We found one complete post set up, and, as I stated before, various portions of other posts, that is, columns and bases and heads lying around; the exact number I don't recall at this time.

Q. I see in this contract and specifications there is a provision that changes may be made if called for after the inspection of the first post. Now, when was the first post inspected? Was that the one in January that you had reference to?

A. Why, it was, I would say, between the 5th and the 10th of January.

Examination by the Court.

Q. Mr. Geller, when you submitted your bid to the Albany Iron Works and the other Eugene Companies, what designs did you submit?

A. We submitted the same designs and specifications as were offered in evidence here, and were submitted to the plaintiff in the case.

Q. That was the design that was prepared by

Gross Brothers?

A. No, the design of the post was prepared by Mr Alvin Meyers, superintendent of the Water Board, for the board.

Q. He is the one that designed the post? Now, you submitted that design to each one of these four concerns that you desired to bid upon the work?

A. Yes, sir.

Q. The identical design. You didn't submit the design of plaintiff to either of these concerns?

A. No, not at all; not at all.

Q. Well, you asked plaintiff for a bid upon his design, did you?

A. Yes, we asked him—we told him, to the best of my recollection, in the correspondence that he could, if he wished, submit a quotation on his own type of post—if he wished.

Q. Well, you didn't intend to adopt that without giving these other concerns a chance to bid upon that, did you?

A. No intention that I know of. Oh, you mean on the type "S"?

Q. Yes.

A. I don't think there was any intention of that kind.

Q. Suppose the type "S" had given you such a low bid as it would have been to your interest to adopt that type, and to adopt their bid, would you have adopted that bid without giving the other concerns a chance to bid upon that type as well as upon the Meyers type?

A. Well, that would be all subject to the action of the Board, of course. Just what action they would have taken, I would not know or be prepared to state.

Q. Well, what was your purpose, then, in submitting to the plaintiff for a bid upon type "S" and not submitting the same thing to the other concerns?

A. I believe there was one or two members of the Board that rather liked Mr. Grelle's design better than they did ours. While I am not positive at this time, perhaps that is the reason the bid on their type "S" post was asked for.

Q. Well, was it agreed by the Board—did the Board adopt the Meyers type before asking for bids, as the type to be erected on the streets?

A. They practically had, yes, sir.

Q. And then they asked the plaintiff to give a bid upon the "S" type simply to satisfy the plaintiff, and not with any intention of adopting his bid if it had been made?

A. Well, I don't know just perhaps what the ultimate intentions might have been in that respect, any more than I have stated.

Q. (Cross) Just one question: Is it not a fact that the City of Eugene had in the fall determined to introduce an electric lighting system there and buy lamp-posts for that purpose? They had determined to do that?

A. Oh, yes.

Redirect Examination.

Q. Mr. Geller, the Water Board never did have in its possession the details and specifications of the

plaintiff's type "S" post?

A. Not to my knowledge. I am satisfied they did not, any more than from the photograph.

Q. As I recollect it, Mr. Grelle sent the Eugene Water Board a photograph of his type "S" post?

A. Yes, sir.

Q. But not the plans or details of his post?

A. Never any around there that I knew of. I think if there had been, I would have known it.

Q. You would have known it?

A. Yes.

Q. Are you the custodian of the records of the Water Board?

A. Yes.

Q. Its books and papers and correspondence?

A. Yes, sir.

COURT: Could the plans and details have been drawn from that photograph?

A. Why, I doubt if any satisfactory plans could have been drawn.

COURT: You are not an architect?

A. I am not an architect or anything of that kind. Excused.

ALVIN MEYERS, called as a witness on behalf of defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SKIPWORTH:

I am superintendent of the Eugene Water Board, and have been since some time in September, 1911.

My duties are, briefly stated, superintending the operation and construction of their electric lighting plant, street lighting system, and the water works plant—water works system. I am an electrical engineer, graduated from the University of Wisconsin.

Q. You may state what experience you have had since that time—just the number of years, in a general way.

A. Well, I have been out since 1901, practically 12 years, from college. I have been in active practice ever since, largely in the design of power plant work, and city work, distribution lines. I had charge of the City of Eugene's electric plant. I am acquainted with Mr. Grelle, the plaintiff in this case. I designed the post known in this case as the city's post. I designed that post the latter part of November and the first part of December, 1911. I drew the specifications, and the details were worked out under my supervision, in my office, by men employed by me in the city.

The plaintiffs in this case did not submit to me their plans and specifications of their type "S" post. I have never had in my possession any of the plans or details or specifications of plaintiff's type "S" post. I submitted to the plaintiff the plans and specifications in detail of the post designed by me, known in this case as the city's post. Mr. Grelle was in our office a short time before the plans were finished, a few days before, and the plans and specifications were mailed to Mr. Grelle. I went into the detail of the plans as they were laid out on the drafting board. The plans were not finished so as to secure prints from them at that

time. The plans were practically finished, but the tracings were not made, so that the prints were not in readiness to be taken. But the details of the working parts, working drawings, were finished at that time.

Q. Did you explain them to Mr. Grelle?

A. Yes, sir. I believe I went into them quite thoroughly.

Q. Did he say anything to you about applying for a patent on his type "S" post at this time?

A. No. He offered no suggestion of that character whatever.

Q. Had you seen a photograph of his type "S" post at this time or before?

A. Yes, sir. I had seen a photograph. He had sent me a photograph some time prior to this.

Q. Did he make any claim to you at any time that he intended to apply for a patent upon his type "S" post?

A. He did not.

Q. Or that this post was similar to his type "S" post?

A. He did not claim that the post was similar to it, and, as I remember it, there was some discussion affecting that matter, as to the matter of professional ethics. I spoke to him regarding the design of his post and the design of mine, and practically spoke of not wishing to even infringe on any design of his, and there was no suggestion of any infringement of any character whatever at that time, and I felt satisfied that it was all conceded that there was no similarity

of design.

Q. Was there any claim by Mr. Grelle at any time that there was any similarity between the two posts?

A. There was not.

Q. Could you have prepared the details and plans of your post from the photograph of the type "S" post?

A. Why, no, I could not have made drawings, except that new patterns would have been required throughout. I could not have made drawings from the photograph of that post. I could have made drawings, but the patterns would not have been identical with those of the post.

COURT: With the photograph before you giving you the idea of its construction, could you have made drawings and a pattern which would have been similar to that?

A. Been very similar, yes, indeed.

Q. Mr. Meyers, I hand you a design of post here, marked "Pendant Egyptian Standard," and ask you to state whether or not you to some extent in designing your post followed the design of this post?

A. Why, I followed the design of this post very largely. This post is what started me on the design, and which was followed in the main throughout.

Mr. SKIPWORTH: The defendant City of Eugene at this time offers in evidence the cut of a post known as "Pendant Egyptian Standard," introduced for the purpose of comparison.

Marked "Defendants' Exhibit 3."

Q. Where did you get the design of that post, Mr.

Meyers?

A. In answer to the correspondence with the various manufacturers of posts. That design, that particular one, comes from Minneapolis.

Q. And is it patented, do you know?

A. It is not marked "Patented." It is my general presumption that it is not patented.

Q. Is it advertised in any pamphlets or catalogues?

A. It is.

Q. In the catalogue of the Flour City Ornamental Iron Works?

A. I had a number of catalogues and cuts of other posts in my possession at the time I designed the city's post. I think the principal one that I used in addition to this was the one known as the "Cutter's Boulevard Post."

"Defendants' Exhibit 1," "Cutter's Boulevard Post." I had a cut of that post in my possession at the time I designed the city's post.

A. It seems to me I got that about in the early part of that work. I don't know just what time—perhaps the latter part of October, 1911.

Q. Was the Plaintiff's type "S" post submitted to the Water Board—cut of the photograph of the plaintiff's post, type "S," submitted to the Water Board?

A. Yes.

Q. And did some of the Water Board like that type of post?

A. Some did. The majority, however, didn't like it so well, and gave me orders to go ahead with the

design of a post.

Q. Did you design this post under the instruction of the Water Board?

A. I did.

Q. What was the object in asking the plaintiffs to offer quotations on their light-post, or did you make any such request?

A. I believe there was such a request, yes. There were several of the Water Board who liked this type of post, were rather anxious to get quotations on that post.

Q. Did you submit plans and specifications of your post, or the city's post, to each of the four bidders?

A. I did.

Q. And you never had any plans or specifications of the type "S" post?

A. No, sir.

Q. Merely the photograph?

A. The photograph.

Q. Would the photograph have been sufficient for bidders to bid on?

A. Why, no, it would have been unsatisfactory.

Q. Well, could they have determined the cost of making such a post without the detail?

A. No, they couldn't have done so.

Q. Did the plaintiffs ever offer you the plans and specifications of their post?

A. No, sir.

Q. Do you know when Gross Bros. commenced the manufacture of the city's post under their contract?

A. Why, they commenced a few days before the contract was actually signed.

Q. After it was let, but before it was signed?

A. Yes.

Q. Do you know what preparations they made in getting their plant ready to manufacture these posts?

A. Why, they made considerable preparation, in the manufacture of core-boxes, cores, and their entire molding equipment—the patterns had to be gotten out for the work.

Q. How many posts were manufactured prior to January 11, 1912?

A. Why, there was one complete post inspected by the Water Board and myself on January 5th. The post was completed—I received notification that the post was completed January 4th. At that time, I think, if I remember correctly, there were some twenty odd columns and bases in Mr. Gross' foundry that were practically completed. The posts, I believe, were complete at that time, excepting the globe-holders, which had been held up for some time to get the exact dimensions of the glass globes.

Q. Were the arms completed?

A. The arms and base of the post, columns and bases, were completed at that time.

Q. What do you mean by the globe-holders?

A. Those cup-shaped parts that support the globe alone.

Q. Does the post designed by you differ from the type "S" post of the plaintiff, and if so, in what particular?

A. Why, the post designed by me, I consider is an entirely different post—built on entirely different lines. There are no two lines of this post exactly identical with the lines of the post designed by Mr. Grelle. The entire form of the post leans to square. The base of the post is square. There are square inset panels.

Q. Square what?

A. Inlet panels. The column, of course, is on the round. However, the fluting, I do not think that it corresponds at all to the design by Mr. Grelle; that is, the flutings in size and shape are entirely different.

Q. You mean the fluting on the city posts?

A. On the column, yes.

Q. The fluting on the column of the city post and the type "S" post is different?

A. Yes.

Q. How is it different? In what way?

A. On account of the size of the flutes of the panels, and the number and markings around the post. The head of the post is essentially square in all sections. The arms are square. Whereas the head of the post of the type "S" post is round, and the arms are round or elliptical in section. They are fluted, while the arms of the city's post are paneled, presenting entirely the squared effect.

Q. Now, what would be the effect upon the eye—the eye of a mechanical observer?

A. The posts would, in my opinion, look entirely different.

Q. Why?

A. Because of these differences of designs, be-

cause these lines do not follow, and do not cause the posts to resemble one another.

Q. And what would be the effect upon the eye for a distance, say, across the street?

A. One can easily see that the post is square.

Q. If the two posts were side by side across the street, what would be the effect on a casual observer?

A. Any one could easily see that one post was round and the other was square.

Q. If the posts were side by side, and lighted, after night, then what would be the effect?

A. Well, if the posts were lighted after night, and you were not able to see the posts, especially as they are painted black, why, you could have a great variety of posts that would look alike. In fact, you might have the same effect produced without any post at all.

Q. Explain what you mean by that—have the same effect produced without any posts. Have you any way of illustrating it?

A. I have brought a model to the court-room with which I believe I can explain.

Q. Yes, if you will kindly explain. Will the court permit the witness to stand over there and explain?

COURT: Very well.

A. This model is built entirely of pipe, with the same cups or globe-holders, and is built to exactly the same dimensions as the post-head proper. The post might support these lights in exactly the same position by having this pipe run from a cement base in the ground, and I would hardly consider it a post at all. If it were considered a post, it would be called a pipe

post. And at night it would be very difficult to discern any difference between this post and that one. In fact, this one might be as well turned upside down, in which case the globes at the same position would represent the same figure exactly.

COURT: I don't understand your position on that, Mr. Meyers.

A. I mean that the lights would be supported in the same position, and that after night one could not tell the difference.

COURT: Well, wouldn't you see the arms after night?

A. No, not to any great extent. After night in the distance one does not see the post itself proper; and that is conspicuous in all night photographs of ornamental post systems. It is very difficult to discern, with a night photograph, what the post is like in any respect. One can only see the relative position of the glass globes. At night this post would look very much like that one, or if taken in the very dim distance, where you cannot reasonably see the post, or with a dark background for the post, in which case the post is obliterated, this post would look like the other. That is, all posts with the lamps in approximately the same condition and same relative position—it need only be approximate—would look very much alike when one cannot clearly see the post. In fact, these lamps are still in the same relative position on this model as they are on the head of the post, and yet the general features of the supports are entirely different.

Q. State as to the actual distance between those globes, the position they are from center to center.

A. The actual distance between these globes, between the centers, is 28 inches from each one; and the actual distance between the centers here is made the same—28 inches.

COURT: Well, you wouldn't say that there is any similarity between those two posts?

A. The posts would not really be visible at all. The similarity would consist largely on account of the lights and the globes.

COURT: The contest here is over a similarity of the posts, and not particularly of the lights.

Mr. SKIPWORTH: That is true. There is no question about that.

Q. Now, Mr. Meyers, do you know how long fluted columns have been in use?

COURT: I suppose that is a matter of common knowledge.

Mr. Doyle said 2000 years. I have an idea it is twice that, or more.

Q. Is there anything new or novel or ingenious in the design of either the city's post or the plaintiff's type "S" post?

A. I do not consider that there is anything new or novel.

Q. Isn't it a fact that there is great similarity between all street lighting posts?

A. Well, all posts have certain things in common, in order to enable us to name them posts, I presume.

Q. Well, what have they in common?

A. Well, commonly they have a base and a shaft, and they have some point to support the lamps.

Q. Have you yourself observed a general similarity between street lighting posts?

A. Yes, I have.

Q. To any extent?

A. Yes, to a considerable extent.

Q. Does the post designed by you differ from the plaintiff's type "S" as much as other posts differ from it—other posts in evidence?

A. Yes, I think so. I presume they do.

Q. How about the Cutter's post—Cutter's Boulevard Post—represented by Defendant's Exhibit 1?

A. Well, I am of the opinion this post is more similar to the type "S" post than the city's design.

Q. Why?

A. Because of the fact that the entire post is designed with round parts, and tends much more to ornamentation. The head of it is designed with round and elliptical shaped arms. The cups that hold the globes are ornamented. The post is generally ornamented to a greater extent.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Meyers, in your direct testimony you said that the conversation between yourself and Mr. Grelle all conceded that there was no similarity, this remark being made when you had your plans and specifications there, I believe. What do you mean by that? Who was there? Who conceded?

A. Mr. Grelle raised no objection, or said nothing

to the contrary whatever; and I did mention those conditions.

Q. Mention what conditions?

A. The fact that my post was not similar to his, and that I had gone to an enormous expense on the part of the city to re-design a post, and that I would not take any post similar to his post, and offer that in competition with his post.

Q. Now, prior to that time, you had seen the drawings of Mr. Grelle's post, had you not?

A. I had seen a sketch in Mr. Grelle's office, yes, sir.

Q. Well, that sketch suggested, in all its outline at least, the type of post which is spoken of here as "S", being the patented post of plaintiff?

A. Why, I believe, as I remember that sketch, that the type "S" post resulted from that sketch in Mr. Grelle's office.

Q. Yes. And the fact is that that sketch did suggest all the motives and things that enter into the sketch, did it not? I mean, the designing of the post—that sketch which you saw at that time?

A. Well, I don't know that it suggested all of the things that entered into the design or not.

Q. Its general outline?

A. But it suggested generally the post as finally designed by Mr. Grelle.

Q. You listened to testimony here by Mr. Hensill and also by Mr. Doyle. Do you differ with them with regard to the outlines of the two posts, disregarding ornamentation and details, exterior details, being the

same; that is to say, when comparing the plaintiff's post and the defendants' post as shown on the drawing here before you?

A. I don't consider that this is a fair outline of either post.

Q. Well, assuming that to be a fair outline, do you agree with them, or differ, that, admitting that the plaintiff's sketch was the prior in point of time, in that case it was directly suggestive of the defendant's outline?

A. I don't think so.

Q. You disagree with their testimony, then? Is that right?

Mr. SKIPWORTH: I object to the form of the question, your Honor. I think the witness should be asked questions.

COURT: I think he can answer that question.

Mr. SKIPWORTH: Exception.

COURT: It is a short way of getting at it.

A. I didn't understand that.

(Question read.)

A. I would certainly say that that was not suggestive.

Q. You would say that the left hand portion of plaintiffs' exhibit "Y" is not suggestive of the right hand portion?

A. No, sir.

Q. You know what the classic arm or console is, do you not?

A. I don't know as I am familiar with that particular term.

Q. Well, you know a figure which embodies a central portion, with scrolls at both ends, somewhat similar to that shown on the top portion of Plaintiff's Exhibit "DD"?

A. Yes.

Q. Do you recognize the right hand upper portion there as being a console?

A. I don't know as I can use that term just exactly. I don't know what you mean by that term.

Q. What do you call it?

A. I recognize it as a particular figure that is used very, very frequently.

Q. Isn't it of the classic type?

A. I don't know that it is of the classic type.

Q. Not familiar with it?

A. Not familiar with it, no, not with that.

Q. Assuming this upper right hand portion of Plaintiffs' Exhibit "DD" to be of the classic type, do you not concede that the portion shown on the left hand upper portion of the sheet marked "Plaintiffs' Exhibit DD," is suggested by that on the right hand portion?

A. Why, I think that either might suggest the other.

Q. Now, is it not a fact that the arms shown here in the upper portion of "Plaintiffs' Exhibit DD," are directly suggestive of the arms shown here in "Defendants' Exhibit 1?"

A. They are very similar to the arm shown, yes.

Q. In your conversations with Mr. Grelle, did you ask him whether his design or his drawings were pat-

ented?

A. I did not.

Q. Or were going to be patented?

A. I did not.

Q. You knew that he claimed that they were original with him?

A. I don't know whether I was aware of that fact or not.

Q. At all events, that is the first time you had ever had them called to your attention by him?

A. Yes, sir.

Q. Did you make any effort to find out whether the design that you made infringed upon any other design or any other patent?

A. Yes, to this extent: That I was careful to notice in each catalogue which I used in developing the design whether or not the post was marked "Patented."

Q. The fact is, you were trying to get up a design which was free from patents, in adopting something for the manufacture of the City of Eugene lamp-posts?

A. Well, I wasn't trying to follow any patented device, I am sure.

Q. Well, you were trying to keep away from it?

A. I would in general, yes.

Q. Well, then, am I to understand that, since you believed the plaintiff's was an original design, something that was neither patented nor known before, you kept as close to that as you could?

A. I don't think I kept as close to that as I could,

by any means. I kept as far away from that, as I before stated, that I would feel positive that no one could accuse me of having taken his design. That was merely an individual motive—not any requirement, as far as I knew of.

Q. You are not familiar with designs as applied to patent law at all, are you?

A. You mean design drawings?

Q. No, the term "Design" as used in the patent law?

A. I am not familiar with the legal conception of it.

Q. Never took out a "Design" patent?

A. No, sir.

Q. Did you ever make any request for details of Mr. Grelle's type "S" post?

A. Not that I remember, affecting his post.

Q. Well, you don't deny that you could have gotten the details if you had asked for them?

A. That I do not know.

Q. The contract, it appears, between the city of Eugene and Gross Bros. was dated December 16, 1911. How soon before that were the bids opened, after Mr. Grelle and other competitors had put in their bids?

A. I think it was on December 12, 1911.

Q. How much work was done by Gross Bros. on the contract which was to be awarded to them, between December 12th and December 16th?

A. Why, I don't know how much work was done; but I passed there several times during that time, and I know they had hired several extra men, and were

cleaning up their foundry and preparing forms for molding and molding boxes.

Q. Well, I would like to find out fully from you, if you know, as to what the condition of the work was on January 4, 1912, with regard to work being done under the contract referred to.

A. Yes, in a general way, there was, as I remember it. I think I counted twenty columns and bases and most of the arms finished at that time, awaiting the globe-holders. One post was finished complete, and was set up in place for acceptance, at that time.

Q. It appears in the contract here that you had a right to demand changes after the first post was inspected. I would like you to tell me whether you waived that right.

A. I never waived the right. The post was inspected, and the men were told to go ahead.

Q. Well, then, are we to understand that all this material that Gross Bros. made up ahead of the inspection, they took a chance on that all being right?

A. To a certain extent, yes. But it was convenient for me to see the work in progress at Gross Bros.' foundry repeatedly, and as the work was going on I assured them that I would be satisfied with certain portions of it.

Q. Did Gross Bros. make any demand for money prior to the March 1st estimate?

A. I don't know that they did. The demand would not have come to me.

Q. Can you explain—there appears to me to be an element of discrepancy here—if on January 4th the

Gross Bros. had substantially twenty posts complete—why they received a payment for a smaller quantity on February 1st estimate, or March 1st? In other words, when they got their first payment, why not all the work that they had done was included?

A. I cannot say, because in my capacity as superintendent I was away from Eugene a good share of the months of February, March, and some in April—the entire month of April.

Q. Do you know why it was that Gross Bros. received no payment on February 1st, when they had all this work done by January 4th—these twenty posts practically complete?

A. I do not. I would like to say in that respect, that I do not know that they had the arms entirely completed at that time for those twenty posts; but I feel sure that they had the bases and columns completed at that time. Those I know of—passed upon.

Q. Mr. Meyers, when you made that design for the lamp-posts, made your own design for the lamp-posts, that is, these drawings and specifications, is it not a fact that you had Mr. Grelle's photograph, or cut, or whatever it may have been, right alongside of you?

A. I had Mr. Grelle's photograph among the other views and cuts that I had.

Q. You took a great liking, did you not, to that design of Mr. Grelle's, in its general outlines?

A. Why, I don't know as I took any special great liking to it. I believe I rather liked the post the first time I saw it, but only to that extent that I have—

Q. Well, do you consider that the design which you got up, from an artistic standpoint, is superior to that which Mr. Grelle got up?

A. Well, I did not consider it so in a way, and yet in another way, no. The design that I got up I made a special effort outside of the artistic standpoint—I suppose perhaps in some people's eyes I destroyed the artistic appearance of the post by trying to make the post exceedingly plain, so it would not catch dust as practically or nearly to the extent that all the other posts would, with their extreme ornamentation. Leaving that off, I considered that I had a post that would present a much better appearance during the dusty summer.

Q. Well, isn't it a fact, when we take a square surface and knock off some of the corners, we get it towards the round?

A. I suppose that is true.

Q. Well, when you knock off the corners, you have less surface, have you not?

A. I suppose you do; but if you leave the corners very rough and jagged, you will have lost the whole thing you are trying to gain.

Q. Well, of course, that part would be merely a part of finishing and detail in finish?

A. Yes.

Q. But you will agree with me that a round surface has less area exposed to the collection of dust than any square surface, has it not?

A. Yes, providing it is round and smooth.

Q. Well, you can make any surface smooth, can't

you, if you try?

A. Well, yes.

Q. Now, isn't it about—summing up the whole matter truthfully, the way Mr. Geller put it, that there was a leaning towards having the work held there in the City of Eugene, and for that reason you gave the contract to Gross Bros. at so much—by the Water Board?

A. Yes.

Q. And isn't it also true that, while you had made no inquiries from Mr. Grelle whether he was going to patent his design or not, you took a chance on that, but you adopted that design because you liked it, and because you thought it was different from other designs which had been brought to your attention?

A. Well, I did not in any respect adopt Mr. Grelle's design, but I did attempt to design an entirely different post, which would be a post that was individual for Eugene, and that consideration was also taken into account by the Water Board, that they rather preferred a post which would not be found at large throughout the country.

Q. Well, but the fact is that you were influenced to a large extent by the sketch, drawing, photograph that you had seen of Mr. Grelle's post in making up your own design?

A. Why, at first, as I said before, I rather approved of Mr. Grelle's design, but as I went further on I did not approve of Mr. Grelle's design, and went to the other extreme, and took other cuts entirely from which my work was developed.

Q. Well, you admit that there is no cut here, at least I haven't seen any, that is suggestive of this type of arm here? If you have any to show to the court, I would be glad to see it.

A. I think this is suggestive of that type of arm.

Q. Then you claim that "Defendants' Exhibit 1" is the only one that you have that is suggestive of the plaintiff's type of arm?

A. That is the most nearly like the general type of arm in the plaintiffs' type "S" post.

Q. And you come to that conclusion notwithstanding that there is no scroll work on the plaintiff's type of arm whatsoever?

A. The scroll work is easily omitted there. It is not essential at all.

Q. Then, is it not a fact that the only similarity that you find between the plaintiff's arms of his lamp-post and that of the arm of the post here in Defendant's Exhibit 1, is that portion intermediate the two scroll extremities?

A. Well, I don't know as I can say that that is entirely true. It looks to me from this view as though there was a base at the end of that arm which conformed very largely to that of the plaintiff.

Q. The base at the end of Defendant's Exhibit 1?

A. The part that is molded fast to the rounded head.

Q. What part do you refer to as the base?

A. I refer to this part right here.

Q. Right near the column?

A. Yes.

Q. As shown in Defendant's Exhibit 1. There is a scroll there—scroll type, is it not?

A. It is hard to tell whether that is exactly a scroll or a base for the fastening. It is intended to represent to a certain extent a scroll.

Q. I show you a picture taken from a catalogue, and ask you whether the two posts are not substantially identical; if they are not identical, in fact—the tops of the two posts?

A. Why, they are substantially identical. The two—yes, I believe the two cuts are practically identical.

Q. Now, is it not a fact that the smaller cut here, showing a three-light post, has arms which are identical with those in the five-light post?

A. Yes.

Q. Mr. Meyers, is it not a fact that sometime after March 14th you were told by Gross Brothers, or some one connected with them, they had received a letter advising them that the post which they were manufacturing was an infringement of the plaintiff's post?

A. Why, I don't remember just what time. I know that that was reported to me, that Gross Bros. had received a notification that Mr. Grelle expected to get out a patent.

Q. No, I mean after the patent had been obtained?

A. I don't remember of it.

Mr. SKIPWORTH: Show him the letter.

Q. It was after March 14, 1912.

A. I don't remember that we got any communica-

tion whatever after that time. I may be mistaken.

Q. Do you remember having any conversation with Mr. Svarverud about a letter which the mayor or common council received—

A. Mr. Svarverud turned over all the letters that he received to the secretary of the Water Board, or to myself.

Q. Just read over that letter, and see whether that is not familiar to you as having been received. (Exhibit P.)

A. No, sir, that letter was never received. At least, I have no knowledge, and I should have had knowledge of it if the letter had been received by either Mr. Svarverud, the Secretary of the Water Board, or myself.

Q. And Gross Bros. didn't at any time inform you of the fact that they received a letter of that kind?

A. I believe some considerable time later I found out that Gross Bros. had received a letter of that character.

Q. To this same purport?

A. Yes.

Q. Now, it mentions in here in this letter, among other things, "I beg to call the matter to your attention and ask you forthwith to make the proper arrangements, either with myself or Mr. Grelle, for obtaining a license on fair compensation, permitting you to use his design." Was that portion of the letter ever mentioned or discussed in your meetings of the board?

A. Why, I think it was, to a certain extent. I know the question was raised as to whether we had

gotten such a letter or not, and the answer was negative, that we had not.

Q. Is that all the conversation there was about it?

A. Substantially. That is the essence of it.

Q. Did the question not come up in any of those meetings that it would be a proper thing for you to pay royalties if you were infringing on somebody else's patent?

A. Why, I don't think there was any occasion where anything of that kind came up before the Water Board, that is, the Water Board assembled. There may have been some talk of that character among individuals.

Q. Well, were there questions at any time when it was conceded in conversation between the members of the board that they had been notified that they were infringing a patent which Mr. Grelle claimed on lamp-posts?

A. No, I don't know as there was.

Q. Was the matter referred to in any other shape—this infringement proposition?

A. No, not in the work of the Water Board. These letters, as they came in, were mentioned in the Water Board's meetings.

Q. The management of all this work was turned over to you, was it not—I mean, the Water Board? They had exclusive charge of it for the City of Eugene?

A. Yes.

Q. And then, as I understand you, you admit having received these letters, but you simply ignored

them, and paid no attention to them whatsoever?

A. Well, I think there were several remarks passed that they didn't see any reason why they should pay any attention to them.

Q. And that was all that was done about it?

A. That was substantially all that was done about it. There was no action taken by the board as a whole, nor no action taken in the board's meetings.

Q. Mr. Meyers, is it not a fact that you had a conversation about this suit shortly after it was commenced, with a Mr. Wernicke, at his office in the City of Portland?

A. Worthington? I would not be sure. I don't remember the name.

Q. Wernicke is the name.

A. I don't remember the name definitely, to be sure I did or not.

Q. The local representative of the Westinghouse Company, at his office in the City of Portland?

A. I don't know of any one of that name that is a representative of the Westinghouse Company.

Q. His name is Carl L. Wernicke.

A. I beg your pardon. I understood you Worthington. Yes, I spoke to Mr. Wernicke. I don't remember that I spoke anything about this.

Mr. SKIPWORTH: Your Honor, I think he is entitled to time, place and persons present, and all the conversation.

Mr. GEISLER: I am trying to give him that. I want to give him all that. I want to find out first whether he had such a conversation.

Q. It was shortly after the suit had been commenced—now, I will tell you when that was. This suit was commenced—I have a receipt here showing the payment of the clerk's fees December 20, 1912. Sometime after that, at Mr. Wernicke's office in the City of Portland, did you have a conversation with him about this suit?

A. I had a conversation, and the suit was incidentally mentioned.

Q. Now, did you not at that time say to Mr. Wernicke that you would like him to induce Mr. Grelle to discontinue his suit, because it would reflect upon your ethical standing with the Water Board, something to that effect?

A. I didn't say anything to that effect, no, sir.

Q. What did you say about this suit?

A. As I remember it, I did speak to him, and I may have asked him if he could in any way induce Mr. Grelle to drop that suit; that I considered that he was entirely in the wrong, that he knew he was in the wrong, and that he certainly knew that he was infringing on the engineering code of ethics in bringing such suit.

Q. The main differences that you have been speaking about here as in your mind, changing the defendants' lamp-post from that of the plaintiffs' patented lamp-post, is with reference to the details, the panel work and cross-section?

A. The entire appearance of the post as it appears to the casual observer.

Q. Yes, but your main references are to these de-

tails, are they not?

A. Why, the details are largely effective in making up my conclusion, yes, sir.

Redirect Examination.

Q. Will you explain why the Water Board let the contract to Gros Bros. in preference to the plaintiffs in this case, the plaintiffs being a lower bidder?

A. Well, the consideration was largely being able to manufacture them at home, giving the home merchant the chance, and the difference in price, somewhere approximately \$100 in the entire equipment, was considered sufficiently offset in being able to inspect the posts at home and see that they were made according to the specifications, that they were made good, without flaws, and would be satisfactory to the Water Board.

Q. Was the work inspected from time to time?

A. Yes.

Q. By you?

A. Yes.

Q. And by inspection at home, and having the work done at home, the expense of running back and forth between Eugene and Portland was necessarily saved? Is that correct?

A. Well, not only the expense, but the satisfaction of knowing that the work was done in the very best kind of manner.

Examination by the Court.

Q. Mr. Meyers, what position do you occupy in the Water Board?

A. As general superintendent for the Electric and Water Board.

Q. Did the Board employ you to get up this design?

A. They did. They instructed me to go ahead with this.

Q. You said the design was gotten up with great expense? What expense attended the getting up of it?

A. The design?

Q. Yes.

A. The work of a man in the office for a considerable length of time, the making of drawings, and a great deal of my time was spent in looking up different schemes of design for posts—a good deal of my time—and then I went out and sent a young man out at different times. A young man made a trip to Ashland purposely to look into the question of concrete posts.

Q. The Board paid you? I mean, you were paid by salary, were you?

A. By regular salary, yes.

Q. You didn't get anything extra?

A. Nothing extra, no, sir.

Q. Did you say that when you were drawing this design it was your purpose to keep away from the Grelle design as much as you could, so as not to infringe it?

A. Well, I wouldn't say it was my purpose. I would say that I did, to my own satisfaction, finally get far away from it.

Q. Well, you had the Grelle design before you at the time?

A. I had the Grelle design, as far as the photograph would give me the general appearance.

Q. It was a purpose in your mind, was it, or was it not, to keep away from the Grelle design?

A. It was a purpose in my mind not to adopt another engineer's design directly.

Q. Well, did you have the Grelle design in view?

A. No, not to adopt it in any wise.

Q. I mean, did you have the Grelle design in your mind, and at the same time, having that in your mind, it was your purpose to keep away from that design?

A. Yes, sir, to the extent that I should not wish to adopt another's design—

Q. So that you would not pattern after that design?

A. Without special request from them.

Q. Well, now, I understand that you had that design, along with the other designs that you got from these catalogues?

A. Yes.

Q. And that you drew your plans and specifications, and drew your model, from the ideas that you got from those several designs?

A. From the several designs. To what extent I may have been influenced by this particular design, I couldn't say. I had it before me, but I did not wish to follow any of the lines that were presented in that design.

Q. Were you aware that any of the designs, or

was it a fact that any of those patterns or designs were at that time patented?

A. They were not patented, as I took it, when they were not marked "Patented" on the catalogue. Practically all catalogues showing any design patented are marked "Patented."

Redirect Examination Continued.

Q. Did you have any correspondence from manufacturers of posts to the effect that their posts were not patented?

A. Yes, I did.

Q. And did you have some of the cuts of those posts before you at the time?

A. Yes.

Q. And whom did you get the letter from?

A. Why, I got one catalogue from St. Louis, representing a post that was identically like another post that was patented. I also got letters from the George Cutter Company.

Q. Examine these letters and see—

A. I received these letters.

Q. Did you get a letter from the George Cutter Company in reference to their post—their "Cutter's Boulevard Post"?

A. Yes.

Q. And you had their cut in your possession at the time?

A. Yes, sir.

Mr. SKIPWORTH: I would like to introduce this letter from the George Cutter Company in evidence.

Mr. GEISLER: I object to that. It is immaterial

and irrelevant. It seems to express an opinion of a man on an expert question on which there is no qualification, nothing here to show.

Mr. PIPES: It shows the good faith of Meyers. It will cut some figure in this.

COURT: I think it is enough on that subject that he has correspondence with different parties, and that is drawn out.

Mr. GEISLER: For that purpose, I will admit it.

Mr. SKIPWORTH: Can we show in the correspondence that they gave him the information that their posts were not patented?

Mr. GEISLER: That is all right. I don't object to that.

Mr. SKIPWORTH: We don't care in detail.

COURT: You can take that for what it is worth. It will be sufficient that he swears that the correspondence gave him that information.

Mr. PIPES: Yes, that is all right, your Honor. That is a fact, is it, Mr. Meyers, that the correspondence gave you the information that these different cuts were not patented?

A. That they were not patented, and that they did not consider the patent was worth anything.

Mr. GEISLER: I move to strike that out.

COURT: I think that latter ought to go out.

Excused.

Mr. SKIPWORTH: It seems to me we would be entitled to an order of the court to have the plaintiff produce his head in court.

Mr. GEISLER: You don't need an order.

COURT: You will get it here, if you can?

Mr. GEISLER: Oh, surely, your Honor.

Mr. GRELLE: I don't know whether we can get that head here or not, because only a short time ago we sent out two sample posts, and I don't know but what the head we had at that time was in.

COURT: Have you a model?

Mr. GRELLE: Yes.

COURT: What is the reason that wouldn't suit as well as the heads themselves?

Mr. GRELLE: I would like to bring down exactly what the defendant has brought here. If I can do that, I will be glad to.

COURT: Well, you may do that.

Adjourned until 10 a. m.

Portland, Oregon, May 27, 1913. 10 a. m.

ROBERT E. GROSS, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Questions by Mr. SKIPWORTH:

I am a member of the firm of Gross Bros. Iron Works, of Eugene, composed of myself and two brothers, W. J. and F. L. We are a partnership doing business under the firm name and style of Gross Bros Iron Works. Our firm does business in Eugene, Oregon. Our iron works are in Eugene. We are the Gross Bros. to whom was let the contract for the manufacture of a post designed by the City of Eugene. That contract was signed about the 16th of December, 1911,

between the 16th day of December, 1911, and the first day of January, 1912. About the first thing we did was to make the patterns and core-boxes and flask to mold the parts in. We were at a large expense for that sized order, approximately \$500 or \$600. We had not manufactured any posts prior to these posts for the city. We commenced the actual work of manufacturing immediately after we signed up the contract. By January 11, 1912, we had several of the different parts cast but I don't know as we had very many, if any, except one, perhaps, assembled together—all together.

Q. Well, How many parts had you manufactured by January 11, 1912?

A. Well, I would say about parts for about 15 to 25 posts, but the posts were not completed or the parts assembled. We did not know at the time you took this contract the plaintiffs claimed any patent upon their type "S" post. I was not acquainted with Mr. Grelle at that time. I had no communication from the plaintiffs in reference to an infringement on their post at that time. "Plaintiffs' Exhibit M," which is a letter from the plaintiffs directed to our firm—Gross Bros. Iron Works—dated January 11, 1912, is the first notice I had that the plaintiffs had applied for a patent upon their type "S" post. "Plaintiffs' Exhibit O," which is a letter from the plaintiffs directed to our firm, dated March 6, 1912, was the second notice we received from the plaintiffs in reference to this matter. "Plaintiffs' Exhibit Q," which is a letter from Mr. Geisler, attorney for plaintiffs in this case, directed to our firm, dated March 14, 1912, was also

received by us. At the time I received this letter, about forty or fifty posts were completed. The contract was for 92 of five-light posts.

Q. You may state to the court, now, what extra expense, besides fitting up your works for manufacturing these posts, you had entailed.

A. We were compelled to hire extra men. Went to some extra expense. We made no profit on the contract. We are not in the business of manufacturing posts and do not intend to manufacture any more.

Q. I wil ask you to state if you would have proceeded to manufacture these posts if you had known plaintiff had applied, or had a patent for his type "S" post, or claimed that this post was an infringement?

A. Certainly not.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Gross, you say that immediately after the contract was signed, you started to manufacture lamp-posts under the contract?

A. Yes, sir.

Q. What do you mean by the word "immediately" there?

A. Well, sir we went right to work to get patterns, as quick as the contract was signed.

Q. Had you any of the patterns started, or finished, partially finished, prior to the date of the signing of the contract?

A. Yes, sir.

Q. How long before that time?

A. We started to make some patterns when we first received the plans.

Q. When was that?

A. I couldn't give you the exact date.

Q. Well, approximately?

A. I think about the 1st of December, 1911, along about the first part.

Q. It was at that time you had first received the plans, and you immediately started to make up your patterns?

A. Yes, sir.

Q. Those patterns you could not have used for any other purpose than for the construction of these particular lamp-posts?

A. No, sir.

Q. Had you at that time, then, received an assurance from some one whom you supposed to be in authority, that you were going to get this contract?

A. No, sir.

Q. Well, how could you go to the expense of making your patterns when you hadn't any idea as to whether you were going to get the contract or not?

A. From the fact that this was new business to us, this lamp-post business, and we thought we could start the patterns and see what there was to do, and what we had to do in case we was awarded the contract, and it would help us to base our figure for the job, as we had two patternmakers, my brother and my father, and plenty of pattern lumber, so that the expense—we didn't care what it cost us to make a start on them.

Q. What other work did you finish prior to the awarding of the contract, with regard to this particular work?

A. Nothing.

Q. You only did the patterns?

A. That is all.

Q. When you received that letter from me, bearing date March 14, 1912, being "Plaintiffs' Exhibit Q," informing you that the patent had been duly issued—would be issued on the 12th of March, 1912, and that your post was an infringement, did you call that letter to the attention of the Water Board?

A. Yes, sir.

Q. Name the particular person or persons to whose attention you called that letter.

A. Well, I think I called it to the attention of some of the members of the Board; also to Mr. Meyers, I believe. I am not so sure whether he was there at that time—but some of the officers of the company. I disremember now just whom I informed of the letter.

Q. Do you remember whether you notified Mr. Geller?

A. Yes, I think I did.

Q. You did?

A. Yes, sir.

Q. When you received this letter from Mr. Grelle, the plaintiff, dated March 6, 1912, and being "Plff's Exhibit O,"—did you notify the Water Board of the City of Eugene officials?

A. Yes, sir.

Q. Did you take any pains to verify the statements contained in those letters, as to whether there was a patent to be issued on these posts or not, after you received that notification? Did you make any effort to find out whether there was a patent issued or to be issued on this post after you received the notification?

A. No, sir.

Q. Did you make any overtures to the plaintiffs here for permission to manufacture under their patent?

A. No, sir.

Q. To pay them a royalty or any thing of the kind?

A. No, sir.

Q. I understood you to say that you would not have proceeded with the manufacture of these posts, if you had known that the post was patented. Did you make such a statement?

A. Yes, I think I did.

Q. Why, then, was it, after you were advised that the post was patented, you continued with the work notwithstanding?

A. Well, I was advised to go right on with my contract.

Q. Who so advised you?

A. The Water Board?

Q. Why was it that, after having received the notice of the issuing of the patent on this design to plaintiff—I refer to the letter written by me to your firm under date of March 14, 1912, at which time you

stated you had only about 40 or 50 posts completed—I wish you would state fully why it was that you went on completing the remainder of the order of the 92 posts, ignoring such notification.

A. I was told to go ahead by the Water Board.

Q. That you took as your exclusive guarantee for proceeding with the order in defiance of the notification or the patent?

A. How is that?

Q. I say, the instructions received from the Water Board you took as your warrant to be sufficient to ignore the notification or the patent?

A. Certainly.

Q. When did you complete the remainder of the 92 posts?

A. I think about the middle of May, 1912.

Q. When did you finally deliver the posts that you had completed about the middle of May, 1912?

A. About the last of May.

Q. Now, what am I to understand by a complete delivery?

A. Well, when the contract was completed, the posts were done, and they were accepted.

Q. You say you had them finished and accepted, but as a matter of fact, they were still in your hands, were they not?

A. They were contained in a building adjoining our property, an old building, belonging to the McClure estate.

Q. As a matter of fact, you were using that shed, weren't you?

A. Well, we could have used it if we had wanted to, but I say we just only had some wood in it.

Q. That was your wood?

A. Yes.

Q. And you put those posts in there as fast as you completed them?

A. They did. They put them in—not us. They accepted those posts at our plant, on our property.

Q. Didn't your own men, after they were finished, take them from your shop and put them into the shed?

A. No, sir.

Q. Who put them in there?

A. The men that worked for the Eugene Water Board.

Q. Now, when did they put them in that building?

A. When they were received by the engineer.

Q. When was that?

A. At different times as the work progressed. I can't call just the exact time that the deliveries were made.

Q. The City of Eugene had nothing to do with this shed whatsoever, had they? They were not using that shed?

A. No; no.

Q. It was really under your control, that shed, wasn't it?

A. Well, yes, you might say it was.

COURT: How is that matter material to the inquiry?

Mr. GEISLER: Just this, your Honor. There is

a question of delivery. I want to fix the delivery. Delivery is not made until there is a complete delivery—it is a sale at that time. I contend that simply taking the posts from one portion of the shop and putting them in another portion of the shop, with notification of the defendant city that they could come and help themselves whenever they wanted, is not a delivery.

COURT: Gross Bros. are sued here for an infringement of the patent.

Mr. GEISLER: Yes, your Honor. I am fixing that they did make an actual sale after the patent issued, or at least completed the sale after that.

COURT: Very well.

Q. When did you receive your final payment on the contract for the posts?

A. About the 14th of June, 1912.

Redirect Examination.

Q. Now, Mr. Gross, when you received these letters that are in evidence here, directed to your firm, didn't you consult me in reference to the matters contained in those letters?

A. Yes.

Q. Didn't I advise you—

Mr. GEISLER: That is rather leading, it seems to me.

Mr. SKIPWORTH: Well, it is redirect examination.

Mr. GEISLER: All right.

Q. Didn't I advise you, in my opinion that the city's post was not an infringement of the plaintiff's

patent?

A. Yes.

Q. You consulted Mr. L. Bilyeu with reference to that matter, too?

A. Yes, sir.

Q. Didn't he give you the same advice?

A. Yes, sir.

Q. Is Mr. Bilyeu an attorney-at-law in Eugene?

A. Yes.

Q. Now, did you have any control over this shed that the light posts were stored in? Was it any part of your shop?

A. Well, I will tell you—we used to have our shop there when we first started in business; we had the property rented. But finally we bought our property, and moved away from that building altogether. We had nothing in there except some wood in an old shed, as the buildings are no good for anything other than that, and this property, as I say, belongs to the McClure Estate, and the McClure boys live in Seattle.

Q. And it was no part of your shop?

A. No part whatever.

Q. Do I understand from your testimony the Water Board received these posts from time to time as they were manufactured?

A. Yes, sir.

Q. Wasn't the last delivery made on the 10th of May, 1912?

A. Well—

Q. Or do you remember as to that?

A. Yes, it was about that time.

Q. Seventeen posts delivered on the 10th of May, 1912. Wasn't that the last delivery, or do you remember as to that?

A. Well, I can tell you by the requests that I have from the Water Board.

Q. Have you any memorandum? Refer to it and refresh your memory.

A. Yes. Well, I have the requisition right here that will show what you want.

COURT: Just give the date.

A. Yes, that is what I want to do. I couldn't see, the way they were pinned in here. The first—

COURT: The last delivery.

Q. The last delivery?

A. 5/10/12.

Q. How many posts? Have you a record there of the number?

A. Yes. 17 five-light posts and 14 one-light posts.

Mr. GEISLER: When was that?

Mr. SKIPWORTH: The 10th of May, 1912.

WADE H. PIPES, called as a witness on behalf of defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I am an architect. I reside in Portland, Ore. I have made a special study of designing in London in the Central School of Arts and Crafts, for nearly three years and a half, and in the office of Charles Spooner, a well known London architect and designer, a member of the Royal Institution of British Architects. I

am in active practice now of architecture in Portland.

Q. Will you examine the type "S" post, which I now hand you, and the city's post, and state in what they differ, from a designer's point of view, commencing at the base?

A. Well, they differ in nearly every respect. The feeling of the design is altogether different. This post is a much—

Q. That is, the city's post?

A. The city's post is a much coarser motive altogether. This is more refined. The moldings are more refined.

Q. That is, the type "S" post is more refined?

A. Yes, more refined. Of course, all of these posts are based on a column. The column has been in use for hundreds of years. But these posts are about as dissimilar as lamp-posts could be. Of course, all cities, both in America and Europe, have agreed pretty much about what a post ought to be in its general form. There is not very much chance for originality in that line at all. The only chance for originality the designer has in designing a post is in the detail.

Q. Well, now, would those posts be likely—would the difference be noted by a casual observer, in those posts, in your opinion?

A. Well, I should think it would.

Q. Have you examined the top of the type "S" post and the city's post here in the court room?

A. Yes.

Q. Would a purchaser be likely to be deceived by the city's post?

A. That would be impossible.

Q. Would you say that one was a copy of the other in any way?

A. I cannot see how it would be.

Q. Is there anything novel or new in either one of these lamp-posts in the parts?

A. No, there is not. Similar designs have been made all over the country.

Q. For how long?

A. Well, the top part of this sort of posts has not been in use a great many years. They have been in use since they used to use the old kind of electric lights, that dropped down on a wire. When those went out of date, these began to come in, and they used to twist them up on the pole—an arc light.

Q. Is there anything novel in the fluted column?

A. Well, the fluted Doric column is as old as Greek civilization nearly. I guess it is as old.

Q. You say all these lamp-posts evolute or develop from the column?

A. Yes. They all have the base.

Q. Have you a picture of any architecture—any column there, that would illustrate what you mean?

A. I have a column here that is about 400 years old.

Q. What building is that?

A. Let me see if the name of it is here. Well, it is an English country house, one of the old ones.

Q. How old is it?

A. It is about 400 years old.

Q. Is this from "Country Life?"

A. Yes.

Q. An English publication?

A. Yes.

Mr. PIPES: I offer this in evidence.

Marked "Defendants' Exhibit 4."

COURT: I suppose it is not claimed that that column is new?

Mr. PIPES: Well, it shows the base, and has a base like the city's post also.

Mr. GEISLER: We don't claim anything for any of those individual parts.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Pipes, you are a brother, I presume, of counsel examining you?

A. Yes.

Q. Now, you are not versed in the patenting of designs for posts?

A. No. No, unfortunately an architect cannot patent his designs, or he doesn't patent them.

Q. And you have never specialized with regard to designing lamp-posts, or anything of that kind?

A. I have not.

COURT: Do you say an architect cannot patent his designs?

A. Well, I am not sure about the law of it; but he never does, as a matter of fact.

Mr. GEISLER: That is a fact.

Q. Now, if I would give you an outline of a lamp-post that I should like to have erected, would it not be possible then for you, without altering the outline

in any shape or form, to make any parts of that lamp-post square, circular, octagonal, elliptical, or other variations from the square, that way in cross-section, and still keep it in the same outline?

A. Yes.

Q. I will ask you to kindly look at the lamp-post on the left-hand portion of the sheet of paper which you are now holding, being a drawing of the plaintiff's lamp-post, an outline of it (the paper being marked "Plaintiffs' Exhibit Y"), and I will ask you to inspect, in connection with that, the right-hand portion of the same sheet, showing an outline of a lamp-post marked "Defendant's post." Now, is it not a fact that the figure shown on the left of that sheet is suggestive, as a whole, and particularly with regard to its upper part, of the figure shown on the right hand portion of that sheet?

A. Yes, it is, but this drawing gives a wholly wrong impression.

Q. Now, wait a minute. I am going to ask you that question. One at a time. What is your answer to that?

A. Yes, the profile is similar.

Q. Now, make any explanation that you want to.

A. Well, I would say that that profile drawing gives a very wrong impression of the dissimilarity of the post.

Q. Well, you have reference to the details that you can put on the outside of the post? For instance, you can put square panels, and you can put any other kind of ornamentation?

A. Of course, this doesn't show any details at all.

Q. But now, disregarding the details entirely—take an outline in form only—and your answer, if I understand correctly, is that the figure shown on the left hand side is suggestive of the right hand side?

A. It is similar, yes.

Q. Well, it is suggestive of it, is it not? It is substantially the same in form?

A. Well, it isn't, no. The general impression is the same, but to any designer, although those moldings seem just very similar there on a small scale drawing like this is, if you draw that the full size, you would see a very great deal more difference than that.

Q. Well, but assuming, or at least taking it for granted, that the figure here on the right hand of this sheet, or defendants' post outline, shows a more abrupt curve, and that the figure on the left hand side, the outline of the plaintiff's post, shows a more graceful curve, in other respects, particularly the upper portion of the two forms, are they not substantially alike? Isn't one suggestive of the other?

A. On the paper there the profiles are similar. I will say that.

Q. Now, would you take the time here and check up the drawings that are in evidence here? I will ask you to do that by and by, check up the blue prints which are in evidence as showing the outline of the design and specifications and so on of the defendants' post, and also that of the plaintiffs' post, and I would ask you to check up with regard to the outline or the form, the general form of the outline, irrespective of

details imposed upon it, or matters such as, for instance, an abrupt curve as distinguishable from a graceful curve—disregarding all those matters—I would like you to take these and check them up carefully, and tell the court of any errors or deviation that we have made, in which either one of the outlines shown on Exhibit “Y” is not a truthful representation of the blue prints furnished. Will you do that?

A. Yes.

Mr. PIPES: When can he do that?

Mr. GEISLER: Any time.

Mr. SKIPWORTH: He cannot do that in five minutes.

Mr. PIPES: You claim that outline is a copy made from the blue prints?

Mr. GEISLER: Yes.

COURT: Do you question that?

Mr. PIPES: Why, no.

COURT: Then there is no need of going into that.

Mr. GEISLER: That is all, then.

Redirect Examination.

Q. Would the fact that the profiles there are similar be any fair test of the similarity of the posts as they appear to the eye?

A. Not at all, because this is an absolutely impossible view of a post. This is a working drawing. You could never see the post as it appears here, because the post is high. You are looking up at it, and you are always looking at it at one angle or another, and the fact that this is square and that round would always be apparent to you. You could not get in position as

you are here. This is assuming that you are looking at every part of the post as you are opposite it, and absolutely square to every part of it and that is an impossible view. It is a view that architects have to make to show the dimensions of things; but it is an impossible view.

Q. But it is a view that the public never see? Isn't that the fact?

A. They could not. It is impossible. They couldn't see it.

Q. Which do you regard of these posts the most artistic, or have you any opinion about it?

A. Well, I regard that one as the most artistic, although I don't think either one of them is anything wonderful at all.

Mr. GEISLER: You meant the plaintiff's, didn't you, when you said "that one?"

A. Yes. That is the most artistic one, yes, sir—the most artistic design.

Excused.

Deposition of G. P. DUNKLIN offered and read in evidence for the defendants.

Mr. SKIPWORTH: I desire at this time to introduce this photograph of our post in evidence. I like it better than the one that is in.

Marked "Defendants' Exhibit 5."

Mr. SKIPWORTH: Also this profile drawing of the post.

Marked "Defendants' Exhibit 6."

Mr. SKIPWORTH: The city rests.

F. C. BAKER, called as a witness on behalf of

plaintiffs, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GEISLER:

What is your age, residence and occupation?

I am a designer of lighting fixtures. In designing fixtures the thought is taken care of first as to the type and the form of the design, and then as to the efficiency of the design. The posts which I have worked out have been for both street and illuminating values, and for decorative purpose.

Q. I show you a paper here with some drawings on it, which is marked "Plaintiffs' Exhibit DD," and would ask you if you have seen that before, and who made those sketches.

A. Yes.

Q. You have seen it before?

A. Yes.

Q. Who made those sketches?

A. I made the sketches.

Q. Would you please look at the figure shown at the right hand upper portion of "Plaintiffs' Exhibit DD," and explain to the court the type of figure there shown?

A. It is what we would term the classic arm.

Q. Now, look at the figure shown in the left hand portion of that sheet, and compare that particular figure with the one in the right hand portion, and state what it is.

A. It is a classic arm slightly modified to take the holder. It is the same type of arm, with the outer curl of the classic left off. It is what we might call a

modified classic arm.

Q. Now, I show you here a cut attached to the deposition of G. P. Dunklin, and ask you to examine the types of arm shown on the lamp-post there illustrated, and compare them with what you have defined on Exhibit "DD" of plaintiffs as the classic arm, and state whether they are similar or dissimilar, explaining fully.

A. Well, the arm on this lamp-post here, No. 2121, is simply a modified classic arm. That is the same base. It is a typical old-style classic arm. The only difference is where the arm passes through the holder, it is modified to make it a little simpler way of fastening the lamp, of fastening the ball; but the base is what we might call the classic arm.

COURT: Do you claim that the arm on your post is a classic arm?

Mr. GEISLER: No, your Honor, to the contrary.

COURT: Then we haven't got any classic arms here in either post?

Mr. GEISLER: No, that is true; and they introduced this, if your Honor will remember, this picture here of the lamp-post attached to this deposition, as anticipating our patent and rendering it void for want of novelty.

COURT: Yes, I understand; and you claim now that this is not an anticipation?

Mr. GEISLER: Yes, your Honor, that is the object of this examination.

Q. Now, comparing the sketches made in the upper portion of Plaintiffs' Exhibit "DD" with the cut

attached to the Dunklin deposition, I would ask you to state whether or not the classic arm, as called by you, would be suggestive of the arm shown in the lamp-post shown in that illustration.

A. You mean to say as to whether or not this arm is—

Q. Is suggestive of the other arm.

A. Yes, the arm on this lamp-post is what we would call the old style, or the old period, classic arm.

Q. Now, I would ask you to look at the lower portion of the drawings there on Plaintiffs' Exhibit "DD" and state whether or not the classic arm is suggestive of the arms there shown.

A. No.

Q. State the reasons for your opinion, and differentiate them.

A. The arm in the two oupper sketches here, one is an old style classic arm, the other is a modification of the old period classic arm, while the sketches below are simply what we might call a structural arm, of a pure modern design. The difference between them, the striking thing, taking it from a period standpoint, is the scroll in the matter of a brace in the old classic arm, which was meant originally to hold something, you see, because it is built up in order to take a shelf on top to support something. This is a mechanical lifting arm, or pure modern mode of structure.

Q. In whose employ are you at the present time, Mr. Baker?

A. J. C. English Company.

Q. What do they specialize in?

A. Lighting fixtures.

Q. How long have you been with them?

A. About three years.

Q. Now, from your viewpoint as an expert in lighting fixtures, I will ask you to state whether or not the arm which is shown in the lower portion of Plaintiffs' Exhibit "DD" is anticipated by anything that is before you now in evidence, or by anything that you know of?

A. No, I could say that it was not.

Q. Now, I would ask you to look at the exhibit of the plaintiffs here, being a top of their lamp-post, and state whether the arms there are suggested by the classic arm, or anything that you know of which was previously known.

A. No, it is a directly opposite arm to what you would trace from any particular style, I would say. There is no particular style that you could trace that type of arm to. It is simply a modern structural lifting arm.

Cross Examination.

Questions by Mr. PIPES:

Is it new or novel, this arm that you have just mentioned, the result of inventive genius and skill?

A. It is—

Q. The type "S" arm, is that new or novel, or the result of inventive genius and skill?

A. I cannot say that it is novel. I think it is a matter, from an engineering standpoint, of a lifting arm. As to the certain time when that type of arm

was first used, I couldn't say. But it is not an arm that you can trace to any particular period or style, because it is more of a modern type of thing.

Q. Have you ever had any of your designs patented?

A. No, I have never had any of my designs patented, not being in an engineering type of work that really called for patent. A lot of our things are patented that we sell, but I didn't happen to be the designer of these patented things.

Q. Now, comparing the two lamp-posts that are involved here, the type "S" and the city's post, with reference to the photograph of the entire post, is there any more similarity between those two posts than you ordinarily meet with in lamp-posts that you see around town here?

A. I would say so, yes, on account of the general outline.

Q. Well, isn't the general outline of all lamp-posts necessarily about the same?

A. No; no.

Q. What does a lamp-post consist of, speaking from an architectural standpoint?

A. Usually they are traced to some period or architectural type of decoration, you see.

Q. Well, it is a development of the old Grecian column, isn't it, consisting of a base and a shaft and the top? Aren't they all constructed on that general idea?

A. Yes; but the mode or the type of supporting the arms of the top is generally worked out to some form

of period ornament, the same as in this other sketch I notice here. They would have the sweep of the old classic arm, where the position of the arms were somewhat similar; but it is an entirely different style.

Q. Have you had any experience outside of this store here of Mr. English?

A. Yes, sir.

Q. Well, what would you say about the appearance of these lamp-posts to the casual observer?

A. Between these two posts?

Q. Yes.

A. I would say, without studying detail on the post, the general appearance of the two would be practically the same. The only difference that I could see would be that the same motive, or same general form or outline, one was worked in the square and the other in the round.

Q. That would not make any difference in the appearance of the finished post, would it, the fact that one was square and one was round?

A. From a flat elevation, it would not, no.

Q. Well, now, would a purchaser that wanted to buy a lamp-post be deceived by the city's lamp-post here—take that for a representation of the plaintiff's post—would he be likely to?

A. From these two drawings?

Q. Well, I am not talking about the drawings. From looking at the posts themselves?

A. From a flat elevation of the post, I would say Yes, because the outline is practically the same.

Q. If you were commissioned by the City of Port-

land, or any other city, to buy lamp-posts, and would examine these two posts—

A. Yes, sir.

Q. Couldn't you tell one from the other?

A. Yes, sir.

Q. If you had at some time prior to the time seen the plaintiffs' type "S" post, could you be deceived by having this post sold to you as the plaintiffs' post?

A. I could hardly say. I might for one reason of the general form of the thing being absolutely the same, and as to whether they were round or square, that was the only difference that I can see between the two.

Q. Which is the most artistic of these posts, in your opinion?

A. Well, they are both about the same character. Plff. rests.

Deposition of G. D. Dunklin, taken as a witness on behalf of defendants, pursuant to stipulation:

I reside at 330 W. Navarre, South Bend, Indiana.

I am sales engineer for the George Cutter Company. I have worked for this company since June, 1907, that is, I worked during the vacations while I was in college, and I have been with them continuously since June, 1910.

I am familiar with the type and design of lamp post manufactured by said company, particular the post known as the Five-Light "Boulevard Post." This post has been manufactured by the George Cutter Co. since October 15, 1910.

Exhibit A hereto attached is taken from a pamph-

let published and distributed by said company. It is designated as "Boulevard" in the catalogue No. 1121.

About forty thousand of these pamphlets have been distributed throughout the United States and Canada.

This five-light Boulevard lamp post has been advertised and described and shown in the catalogues and pamphlets of said company since August, 1910.

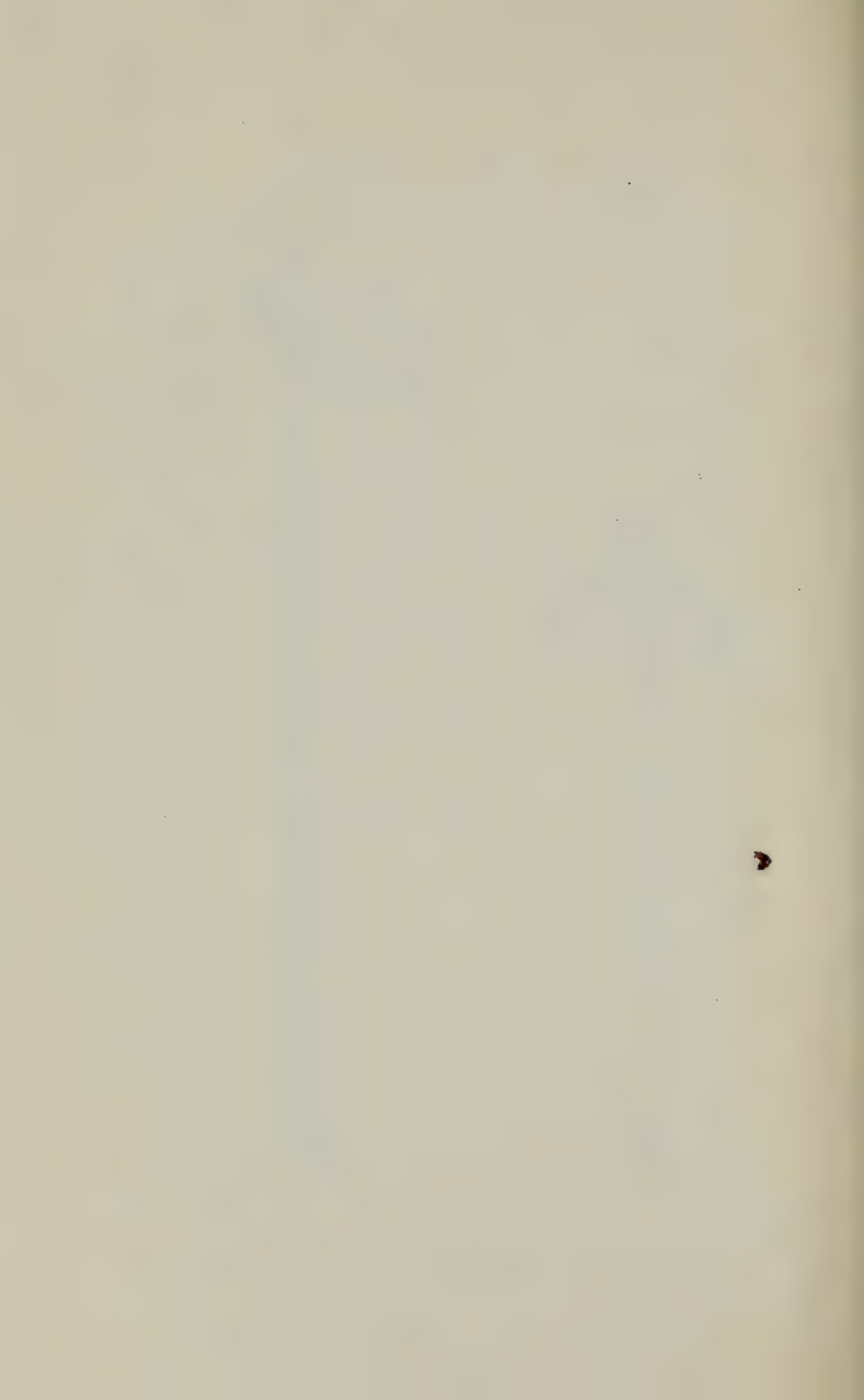
Since October 15, 1910, these lamp posts have been installed at: Jasper, Alabama; Middletown, Kentucky; Tallhassa, Florida, and many other places.

This boulevard lamp post is not patented.



EXHIBIT "A"

Referred to in deposition of G. D. Dunklin.



The foregoing statement of evidence allowed as the statement of evidence on appeal in this cause.

CHAS. E. WOLVERTON,

Judge.

Filed July 7, 1914.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 11 day of August, 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

In the District Court of the United States for the District of Oregon.

No. 5865.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO., a Corporation,
Plaintiffs,

v.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS,

Defendants.

No. 5853.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO., a Corporation,
Plaintiffs,

v.

ROBERT E. GROSS, WM. J. GROSS, and FRANK L. GROSS, Co-Partners doing business under the firm name and style of GROSS BROS. IRON WORKS,

Defendants.

T. J. Geisler for Plaintiffs.

G. F. Skipworth, John M. Pipes and George A. Pipes, for Defendants.

Wolverton, District Judge:

The plaintiff Charles Edward Grelle invented and had patented an ornamental design for a lamp-post, the patent bearing date March 12, 1912. The application therefor was filed in the Patent Office January 2nd preceding. In December prior to such application, the defendant City of Eugene let a contract to Gross Bros., of that place, for the manufacture of certain lamp-posts designed by Alvin Meyers, who was the Superintendent of the Water Board of the City. Prior to letting the contract, the plans and specifications of the Meyers lamp-post were submitted to Grelle, or rather to The Independent Foundry Co., of which Grelle is President, for bids on the manufacture and construction of such posts, and the Foundry Company submitted its bid. Gross Bros. were the successful bidders and were awarded the contract, although the Foundry Company's bid was lower than theirs. Gross Bros. thereupon entered upon the fulfillment of the contract with the city. Later, to wit, on January 11, 1912, Grelle notified both the City of Eugene and Gross Bros. that the lamp-posts being manufactured for the city were in essential design the same as his lamp-post, and that he had applied for a patent on his design; and further indicated that if he procured a patent he would protect his rights against infringement. Still later, and shortly after the patent had issued, Grelle gave notice of such issuance,

and requested that proper arrangements be made with the owner or his attorney for obtaining a license for the use of such design. Neither the city nor Gross Bros. taking any note of such notice, Grelle and The Independent Foundry Co. instituted two suits, one against each of these parties, to enjoin an infringement of the Grelle patent. The two causes have been tried together. It may be further noted that Meyers in devising the lamp-post for the city had before him a photograph of the Grelle post, which has been designated at the trial as type "S," and obtained and adopted some ideas from the type "S" post in working out his own design.

Both designs of lamp-posts consist of a base, a fluted cylindrical column diminishing at the top, a shoulder or head from which four arms extend, and a single light with globe at the top. The four arms extend from the head or shoulder at an angle of forty-five degrees, more or less, and curve downward at the outer ends, from which the lamps with globes are suspended, so that the lamps with the extremities of the arms hang perpendicular. The base of the type "S" post is cylindrical and fluted, having a cap at the top also cylindrical, upon which rests the column. At the base of the column above the cap is a mold for ornamental effect. At the top of the column is a cap with molding underneath, upon which rests the shoulder or head, and on top of that is another cap, and above that is extended the single light. Both of the upper caps and the shoulder or head are cylindrical. The arms are also cylindrical and fluted,

broadening at the base, and so shaped as to fit the shoulder.

The base of the city's post is square in form, with paneling for ornamental appearance. At the top of this is a cap, which is also square, above which rests the column. It has a cap at the top of the column, the same as the type "S" post, but this cap is square in form. The shoulder or head is also square, and the cap above that is square. The arms are also square, with panel ornamentation, and the curves at the outer extremities drop a little more abruptly than those of the type "S" pattern. Y. D. Hensill, a witness for the defendants, describes the distinguishing features of the two posts quite clearly and accurately as follows:

"The type "S" post has a round base, with more moldings than the city's post. The type "S" post has a fluted base. The city's post is square, with a square sunk panel. The type "S" post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type "S" post has a round cap or head. The city's post has a square, with sunk panels. The type "S" post is ornamental. There is a difference in the shape of the arms. One is round—the type "S" post is round, increasing to elliptical, while the city post, the city arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm."

The only question which I deem it necessary to pass upon under the view I take of the cases is, whether the city's post is an infringement upon the type "S"

post. The leading case upon the subject, and one which has been followed since, is

Gorham Company v. White,
14 Wallace 511.

The test in ornamental designs, where brought into contrast, one with another, for the purpose of determining whether infringement has taken place, is the sameness of effect upon the eye, whether there exists substantial identity of design. Nor need it be that the observer shall be an expert in the particular art of which the design is a part, but he may be the ordinary observer in common affairs, the ultimate inquiry being whether such an observer is likely to be misled or deceived into buying one for the other without distinguishing the difference between them. "We hold, therefore," says the court (P. 528), "that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

The designs should be viewed as wholes, considering their general appearance as they present themselves to the eye of the observer, without special attention to minutiae of detail or ornamentation. See further

Hutter v. Broome,

114 Federal 655;

Graff, Washbourne & Dunn v. Webster,

189 Federal 902;

S. C. 195 Federal 522.

Observing this rule, I am firmly impressed that there has been no infringement of the type "S" post by the defendants in the manufacture and use of the city's post. The only parts of the two posts that bear marked similarity are the columns and the arms in their general longitudinal contour and declination to the shoulders of the posts, and even as to these latter, the arms on the city's post at the outer extremity drop more abruptly, as has been previously observed, than the type "S" design. The base of the city's post is square, and the cap thereon is square, while the base of the type "S" post is cylindrical and fluted and the cap is round. The cap at the top of the column of the city's post is square, the shoulder is square, and the cap above it is square. All these in the type "S" post are round or cylindrical. The arms of the city's post are square and paneled, while those of the type "S" post are cylindrical and fluted. To the eye of the casual observer these marked distinguishing features could scarcely escape ready detection, and the probability that the general purchaser would be misled or deceived in buying one of these posts for the other is very remote.

The plaintiff has introduced comparative drafts of the mere outlines of the two posts, which drafts it must be admitted present great similarity, and one cannot be readily distinguished from the other without giving particular attention to detail. But this cannot be a safe test. It is the constructed post as it appears to the eye of the ordinary or casual observer, and when so viewed the two posts are readily distin-

guishable. The city's post runs predominantly in square surfaces, while cylindrical surfaces predominate in type "S," features that must catch the eye instantly and distinguish the one from the other.

These considerations lead to a dismissal of both causes, and such will be the decree of the court.

[Endorsed]: Opinion. Filed Aug. 11, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on Monday, the 11 day of August, 1913, the same being the 31 Judicial day of the Regular July, 1913, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

No. 5865.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO.,

v.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS.

This cause was heretofore submitted to the Court upon the pleadings and the proofs herein adduced by the parties, was argued by counsel and by the Court taken under advisement and now, at this time being

fully advised the Court finds that the equities are with the defendants and that the plaintiffs are not entitled to the reliefs provided for in the complaint;

Now, therefore, it is Ordered, Adjudged and Decreed that the Bill of Complaint be and the same hereby is dismissed, and that the defendants have and recover of and from the plaintiffs costs and disbursements herein taxed at \$140.75.

And afterwards, to wit, on the 5 day of February, 1914, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition and Order for Appeal.]

*"In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and INDEPEND-
ENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named plaintiffs, conceiving themselves aggrieved by the findings and conclusions of the Court in the above named case, and the decree thereon entered in the above entitled case August 11, 1913, hereby appeal from said decree to the United States Circuit Court of Appeals for the 9th Circuit, and they pray that this appeal may be allowed and that a transcript of the records and proceedings of said district

court on which said decree is founded may be sent, duly authenticated, to said Circuit Court of Appeals.

Dated February 5th, 1914.

INDEPENDENT FOUNDRY CO.

By C. E. Grelle,

President.

C. E. GRELLE,

Plaintiffs.

Of Counsel for Plaintiffs.

And now it is ordered that the appeal above prayed for be allowed.

CHAS E. WOLVERTON,

District Judge.

Dated, February 5th, 1914.

[Endorsed]: Appeal. Filed Feb. 5, 1914.

A. M. CANNON,

Clerk.

By F. L. BUCK,

Deputy.

And afterwards, to wit, on the 5 day of February, 1914, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

"In the District Court of the United States for the District of Oregon.

CHARLES EDWARD GRELLE and INDEPENDENT FOUNDRY CO., a corporation,

Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named plaintiffs, having appealed to the United States Circuit Court of Appeals for the 9th District from the decree entered in the above named case August 11, 1913, do hereby assign the following as the Errors committed therein, towit:

I.

The District Court erred in finding that the lamp post erected and used by defendants in said City of Eugene, Oregon, did not infringe upon the design patents of plaintiffs.

II.

The District Court erred in ruling (as in substance stated in the Court's opinion) that while the designs of the plaintiffs' and the defendants' lamp post should be viewed as wholes without special attention to minutiae of detail or ornamentation, and while the outlines of said post present great similarity, and one cannot readily be distinguished from the other without giving particular attention to detail, never theless this is not a safe test, because the defendants' post runs predominantly in square surfaces while the cylindrical surfaces prevail in the plaintiffs' post, and therefore the defendants' post is distinguished from, and does not infringe upon the plaintiffs' patented post, and the bill of complaint is without equity and must be dismissed.

III.

The District Court erred in not finding that the de-

fendants' lamp post does infringe the design patent of plaintiffs set forth in the bill of complaint herein.

IV.

The District Court erred in dismissing the bill of complaint herein without granting the plaintiffs any relief.

V.

The District Court erred in not granting to plaintiffs the injunction and the other relief prayed for in their bill of complaint herein

Dated, February 5, 1914.

T. J. GEISLER,
Attorney and Counsel
for Plaintiffs.

[Endorsed]: Assignments of Error. Filed Feb. 5, 1914.

A. M. CANNON,
Clerk.
By F. L. BUCK,
Deputy.

And afterwards, to wit, on the 5th day of February, 1914, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

CHAS. E. GRELLE and INDEPENDENT FOUN-
DRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

KNOW ALL MEN BY THESE PRESENTS,
That we, Chas. E. Grelle and Independent Foundry
Co., a corpo and W. H. Warren, of Portland, Oregon,
surety, are held and firmly bound unto the above
named defendants in the sum of five hundred dollars,
to be paid to the said defendants or their legal repre-
sentatives, executors or administrators. To which
payment, well and truly to be made, we bind ourselves,
and each of us, jointly and severally, and our and each
of our heirs, executors and administrators, firmly by
these presents.

Sealed with our seals, and dated Feby. 5, 1914.

Whereas the above named plaintiffs have appealed
to the United States Circuit Court of Appeals for the
Ninth Circuit, to reverse the decree in the above en-
titled cause by the District Court of the United States
for the District of Oregon.

Now, therefore, the condition of this obligation is
such, that if the above named plaintiffs shall prosecute
said appeal to effect, and answer all costs if he shall
make good their plea, than this obligation shall be
void; otherwise to remain in full force and virtue.

INDEPENDENT FOUNDRY CO.

By C. E. Grelle, Pres.

C. E. GRELLE

W. H. WARREN

Signed, sealed and delivered in presence of

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, W. H. Warren, of Portland, Oregon, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

W. H. WARREN.

Subscribed and sworn to before me this Feby. 5, 1914.

CECIL DONG,

Notary Public for Oregon.

I hereby approve of this bond Feby. 5th, 1914.

CHAS. E. WOLVERTON,

District Judge.

[Endorsed]: Bond on Appeal. Filed Feb. 5, 1914.

A. M. CANNON,

Clerk.

By F. L. BUCK,

Deputy Clerk.

And afterwards, to wit, on the 9 day of February, 1914, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation for Cause to be Heard at Portland.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and THE INDE-

PENDENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, and M. F. GRIGGS,
Defendants.

It is hereby stipulated between the attorneys of the above named parties, that this appeal shall be heard at the annual term of the United States Circuit Court of Appeals of the 9th Judicial District, held in the City of Portland, District of Oregon, in 1914. And the defendants, respondents, hereby enter their appearance in this case.

Dated, February 7, 1914.

T. J. GEISLER,

Counsel for Plaintiffs-Appellants.

JOHN M. PIPES,

Of Counsel for Defendants-Respondents.

Filed Feb. 9, 1914.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 8 day of July, 1914, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,

District of Oregon,—ss.

To The City of Eugene and M. F. Griggs, Greeting:
WHEREAS, Chas. Edward Grelle and Independent Foundry Co., a corporation, have lately appealed to the United States Circuit Court of Appeals for the

Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 8th day of July in the year of our Lord, one thousand, nine hundred and fourteen.

CHAS. E. WOLVERTON,

Judge.

Due service of the within Citation is hereby admitted this 8th day of July, 1914.

JOHN M. PIPES,

of Attorneys for Defendants-Respondents.

[Endorsed]: Citation on Appeal. Filed July 8, 1914.

A. M. CANNON,

Clerk.

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

**CHARLES EDWARD GRELLE AND
THE INDEPENDENT FOUNDRY COMPANY,
a Corporation
APPELLANTS**

VS.

**THE CITY OF EUGENE, OREGON,
AND M. F. GRIGGS
APPELLEES**

**Appeal from The District Court of The United States
For the District of Oregon**

Appellants' Brief

**T. J. GEISLER,
Attorney for Appellants**

**G. F. SKIPWORTH,
JOHN M. PIPES,
GEO. A. PIPES,
Attorneys for Appellees**

FILED

SEP 12 1914

**F. D. MONCKTON,
CLERK.**

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

CHARLES EDWARD GRELLE and THE
INDEPENDENT FOUNDRY COM-
PANY, a Corporation,
Appellants,

vs.

THE CITY OF EUGENE, OREGON,
and M. F. GRIGGS,
Appellees.

*Appeal from the District Court of the United
States for the District of Oregon.*

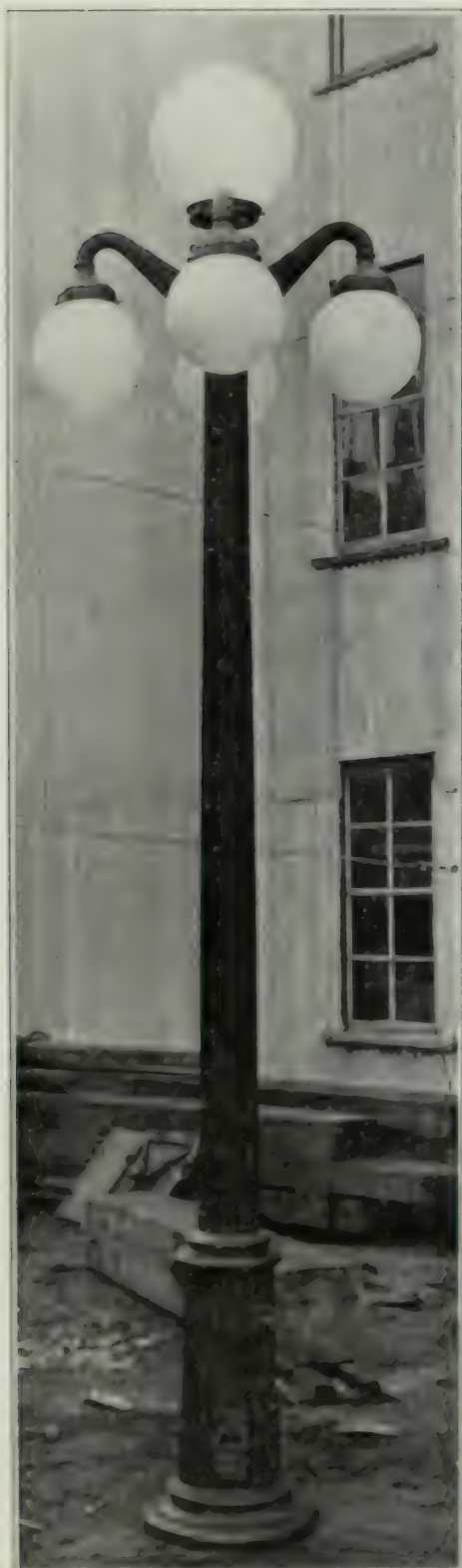
Appellants' Brief

This is an appeal from the final decree of the District Court of the District of Oregon, dismissing a suit brought against the defendants charging infringement of the design patent granted to the above named ^{Charles} Edward E. Grelle, on a lamp post, and under which the appellant Independent Foundry Company holds the exclusive license to manufacture.

The decree of the District Court dismissed the bill for the reason that *while* “*it must be admitted*” that the “comparative drafts of the mere outlines of the two posts” in question “*present great similarity*, and one cannot be readily distinguished from the other without giving particular attention to the details * * * the (defendants’) post runs predominantly in square surfaces while cylindrical surfaces predominate in (plaintiffs), features that must catch the eye instantly and distinguish one from the other.” (Opinion, Trans., pp. 178, 179.) The contention of plaintiffs, however, was that a design “may consist in the simple configuration of a substance or the form given to it as a whole”; in other words, “*the essential characteristics of the appearance imparted to a substance may reside in its exterior outlines only*” (quoting the words of Robinson on Patents, Vol. 1, p. 291, Sec. 204), and the cross section of the thing made after such design could be varied to suit the fancy, without changing the general motive, principle or character of such outline-design.

For convenience of the court, the two designs in controversy are here reproduced, arranged side by side. The outline sketches of these designs are also reproduced.

Front elevation of
Plaintiffs' Post



Plaintiffs' Exhibit "CC"
see page 64, Transcript
of Record

Front elevation of
Defendants' Post



Plaintiffs' Exhibit "AA"
see page 64, Transcript
of Record

Outline sketches of the design patented to C. E. Grelle and manufactured by Plaintiffs, and of the Lamp Post designed by Alvin Meyers, manufactured by Gross Bros. Iron Works for, and installed in the City of Eugene.

PLAINTIFFS' POST

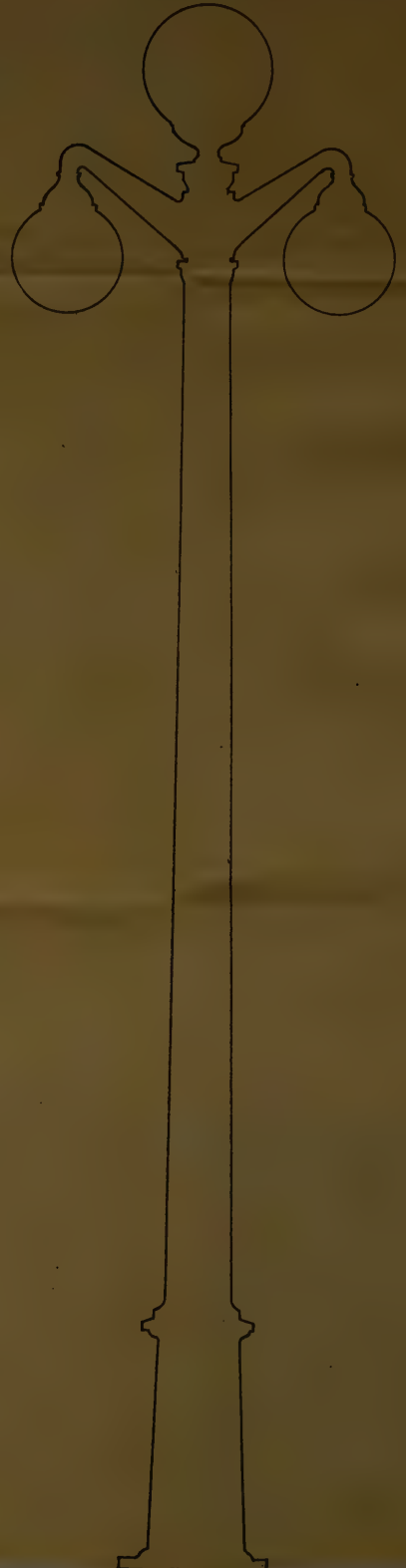
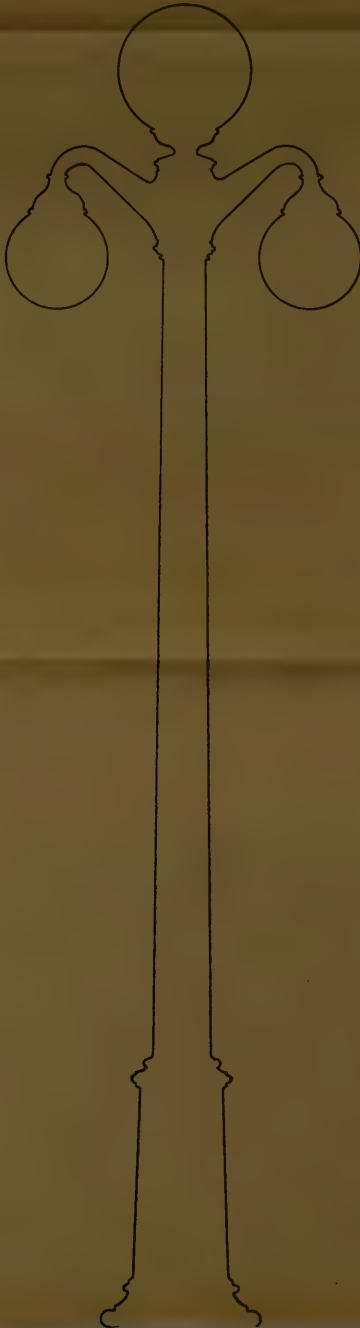




EXHIBIT "A' "

A STATEMENT OF THE CASE

Some time prior to October, 1911, C. E. Grelle, Manager and President of the Independent Foundry Company, conceived a new and ornamental design for lamp post. Shortly after Mr. Grelle received a visit from Alvin Meyers, as a representative of the Water Board of Eugene, Oregon. Mr. Meyers was looking for types of lamp posts that said Water Board could install at Eugene. (Transcript, 45.) Grelle submitted such designs as he had for Meyers' consideration, including a sketch of said new design that Grelle had recently developed. This design seemed to appeal particularly to Meyers. (Transcript, p. 131.) This design was later designated by the Independent Company as their type "S" post. (Transcript, p. 46.) Later Grelle also sent a photo of this particular post to Meyers.

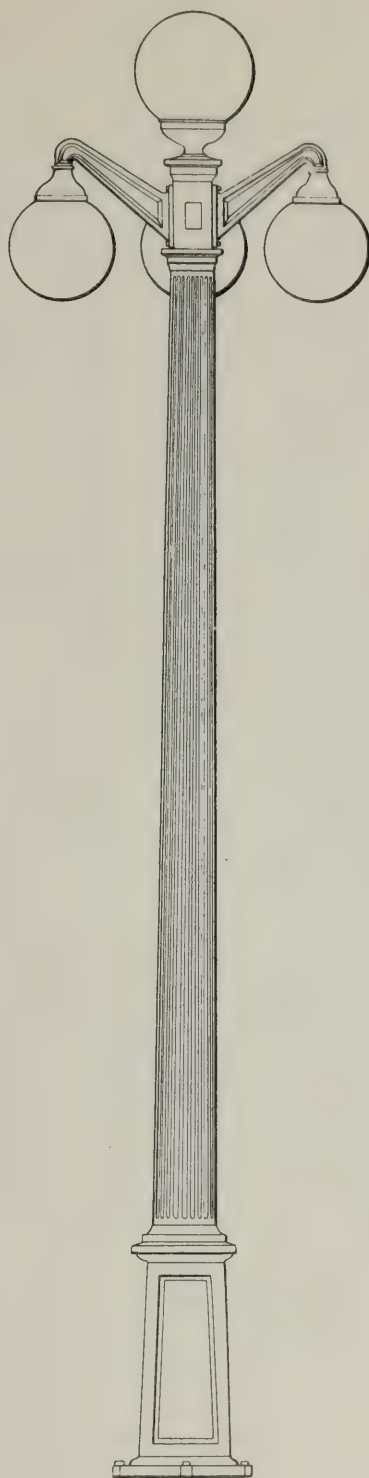
The photo-cut was sent by Grelle to Meyers, in response to a letter written by the latter, October 26, 1911; and on November 27, 1911, the Independent Company sent Meyers a photo of the Grelle lamp post as shown by plaintiffs' exhibit A1, reproduced opposite page 14 of the transcript. The sending of this photo was admitted by defendants. (See Trans., p. 46.) The cut is here reproduced.

On November 28, 1911, Meyers wrote to the Independent Company for quotations on the Grelle post (Transcript, p. 51), with which re-

quest the Independent Company complied by letters dated December 1 and December 9, 1911.

Previous to December 9, 1911, Meyers had drawn the plans of a specification for a post himself, being, as plaintiffs contended, merely a slight modification of the Grelle post, and an estimate of the cost of such modified post was also included in said letter of December 9, of the Independent Company. (Trans., p. 53.)

On December 14, 1911, the Eugene Water Board wrote the Independent Company that they had awarded the contract to a local firm in the City of Eugene. Upon investigation the plaintiffs found that the lamp post adopted by the City of Eugene was the modified design gotten up by Meyers on plaintiffs' said type "S" post. The Independent Company thereupon informed the Eugene Water Board that Grelle had made an application for patent on his design, and that said application had been allowed and the patent would be issued March 6, 1912. (Trans., p. 56.) On March 14, 1912, Grelle, through his attorney, wrote the Mayor and the Water Board of the City of Eugene calling specific attention to the issuance of said patent, enclosing a blue print of the drawing of the patented design, and requested the Mayor and the Water Board to obtain a license from Mr. Grelle to use said design. (Trans., p. 57.) The City of Eugene paid no attention to such letter. They ignored Grelle and the Independent Company entirely, and pro-



TRACING

MADE BY

WM. C. SCHMITT

12-13 '12

of a blue print entitled as follows,

EUGENE LIGHT DEPT

STANDARD ORNAMENTAL POST

Scale 1" = 1'

Nov 29, 1911

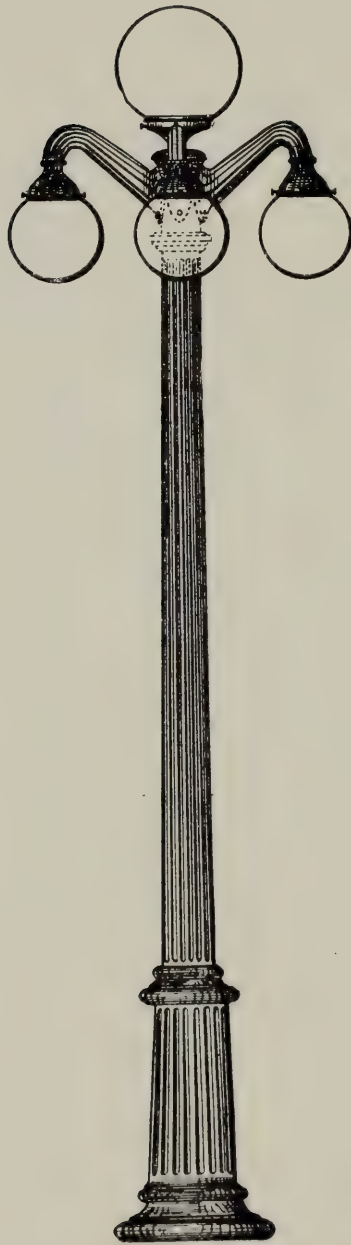


EXHIBIT "A"

ceeded to the manufacture and erection of the lamp post, notwithstanding, and this suit followed.

The Independent Company instituted two suits, one against Gross Bros.' Iron Works of Eugene, and the other against the City of Eugene and M. F. Griggs, which causes were tried together (Trans., p. 175), and by stipulation of the parties the appeals from the decrees in these cases will be heard together, and the disposition of one cause on appeal shall be also that of the other.

The history of the Grelle design patent is as follows:

The application was filed January 2nd, 1902, was passed upon by the Patent Office examiner January 19th, 1912, and was allowed February 16th, 1912. (Trans., p. 58.)

The patent was issued March 12th, 1912, No. 42,283, and constitutes plaintiffs' "Exhibit S." (Trans., p. 59.) The drawing of the design, attached to such patent, is shown on the next page. The claim was in the usual form, reading:

"I claim the ornamental design for lamp post as shown."

In order to show that the outlines, in other words, the motive and principle of the design invented by Grelle and patented to him, and the modification thereof made by Meyers for the

Eugene Water Board, are substantially alike, Mr. Grelle made said outline drawing of these two posts, arranged side by side, constituting plaintiffs' "Exhibit Y." These outline drawings were obtained by scaling the Meyers modified post, plaintiffs' "Exhibit V," being a drawing of the post sent by Meyers to the Independent Company, accompanying his letter of December 7th, 1911 (Trans., p. 61), and drawing on the same sheet and the same scale an outline of the Grelle post. Thus were obtained substantially coincidental views for comparison. (Trans., pp. 62-63.) In order to show, comparatively, the appearance of the Grelle post, *in front elevation*, and the Meyers modified post, plaintiff introduced two photographs; plaintiffs' "Exhibit CC" showing the Grelle patented post design, and plaintiffs' "Exhibit AA" showing the Meyers modified post. These photos are those shown in the introduction of this brief. Plaintiffs also introduced "Exhibit BB," being the photograph of defendants' post from which the cut, plaintiffs' "Exhibit C," attached to the bill, was made, and such perspective view is here reproduced side by side with an angular, or perspective, view of the Grelle patented design lamp post.

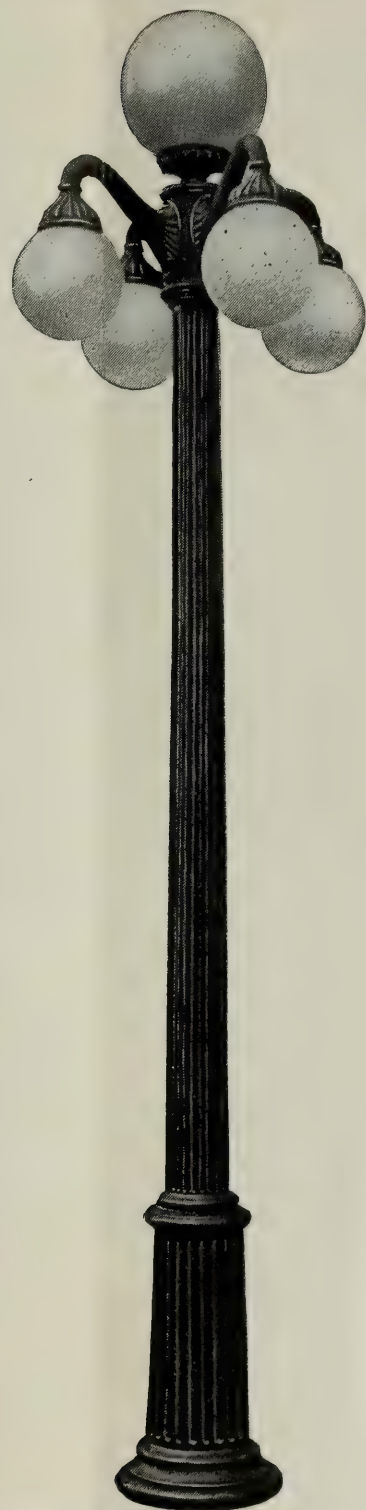
It is, of course, apparent that the defendants' lamp post is made in square cross section, while the Grelle patented design shows a cylindrical post, but Grelle testified (Trans., p. 65) "that a lamp post could be made conforming to the out-

Defendents' Post



Plaintiffs' Exhibit "BB"

Plaintiffs' Post



Plaintiffs' Exhibit "A"

line of his design in round, square or octagonal cross section without changing the outline." This testimony was confirmed by witness Schmitt, who testified as an expert for plaintiffs. (Trans., pp. 79-84.)

The evidence introduced on behalf of defendants may be briefly stated as follows:

Y. D. Hensill was called as an expert by the defendants for the purpose of attempting to prove that the design patented to Grelle was anticipated by the Cutter post, of which an exhibit is given on the page facing page 170 of transcript. The arm of this lamp post was claimed by the witness to be very similar to that of the arm of the Grelle post. The Cutter post, witness testified, was suggestive of the classic type (Trans., p. 93), but he admitted there was little suggesting the classic in the Grelle arm. In fact the testimony of the witness on this point, on his cross-examination (Trans., p. 94), was as follows:

Q. Well, you say there is a little similarity; now where is that little similarity to be found?

A. In a shape of the console from the point it leaves the head here, to the socket here, in the shape.

Q. In the mere fact that it is making a little curve there?

A. It has that irregular curve and drop similar to this.

Q. That resemblance is a very slight one to the classic production of an arm such as I referred to a moment ago, is it not?

A. Very slight.

Q. It is an incomplete one?

A. The comparison is slight.

The same witness being questioned as to the similarity between the Grelle post and the defendants' post, testified (Trans., p. 95):

Q. Now, then, the fact is, however, Mr. Hensill, that the plaintiffs' type of post as an outline is suggestive of the defendants' outline of post, is it not?

A. Merely in the outline.

This witness further testified that a post developed from a given outline might be varied as desired, with regard to cross section, without changing the outline, his testimony on this point being (Trans., p. 90):

Q. Now is it not a fact, with a given outline, I could say to you, Mr. Hensill, "I want that reproduced in square, or in octagonal, hexagon, circular or elliptical, and you could design a lamp post to be manufactured from that outline in each case?"

A. Yes.

The plaintiffs did not claim anything for the base, or the column of the Grelle lamp post; these are merely necessary accessories, and as to

these parts "all lamp posts have to resemble each other to a considerable extent." The difference in the posts being in the top, or head, as testified also by witness Hensill (Trans., p. 87).

The defendants further called as an expert witness A. E. Doyle, a well known architect of Portland, Oregon. Upon being shown the photographs of the two posts for comparison, he testified (Trans., p. 96):

Q. Which is the best one?

A. This large one (referring to plaintiffs' post). "*The other* (referring to the defendants' post) *looks like a poor imitation.*"

Q. You say plaintiffs' post is the best design?

A. Yes, I should say so, decidedly.

Q. That is from an artistic standpoint?

A. From an artistic standpoint, decidedly.

Upon being asked whether the defendants' posts were similar to that of the Grelle posts, he said, "there is a similarity." (Trans., p. 97.)

When cross-examined as to the similarity of the outlines, this witness testified (page 100):

"Yes, of course, they look very similar in outline."

With regard to the novelty of the Grelle post, this witness testified:

Q. Is there anything new or novel in the combination of plaintiffs' post?

A. Oh, I suppose that is a question where you draw the line as to what is new or novel. They are new combinations—there are combinations that I have never seen before. (Page 99.)

This witness admitted that the distinction he drew between the defendants' post and the Grelle patented design was "differences in details." (Page 100.)

Defendants further called as a witness Alvin Meyers, who testified that he was superintendent of the Eugene Water Board in 1911 (page 112). He is a graduate electrical engineer. On cross-examination this witness admitted (page 125) that he received a sketch from Mr. Grelle on his type "S" post, and that it suggested generally the post as finally designed by Mr. Grelle. This witness, however, disputed (pages 125 and 126) the similarity in the outlines of his modified post and the Grelle post:

Q. You listened to the testimony here by Mr. Hensill, and Mr. Doyle. Do you differ from them in the regard to the outlines of the two, disregarding ornamentation and details, exterior details, being the same, that is to say, when comparing the plaintiffs' post and the defendants' post as shown on the drawing here before you? (Referring to plaintiffs' exhibit Y, being said outline cut.)

A. I don't consider that this is a fair outline of their post. (Page 126.)

Q. Well, assuming that to be a fair outline, do you agree with them or differ, that, admitting that the plaintiffs' sketch was the prior in point of time, in that case it was directly suggestive of the defendants' outline?

A. I don't think so.

Q. You disagree with their testimony, then; is that right? * * *

A. I would certainly say that that was not suggestive.

Q. You would say that the left hand portion of the plaintiffs' exhibit "Y" is not suggestive of the right hand portion?

A. No, sir.

This bit of testimony on the part of Meyers, contradictory of defendants' own expert witnesses on the same question, manifests his *animus* in the whole transaction.

The reason that Meyers chose the Grelle design for the Eugene lamp posts was he believed this design to be original, and he wanted to adopt something for the City of Eugene that was free from patents and he had not been told by Grelle that the latter's design was going to be patented. (Trans., p. 128.) Meyers admitted that when he drew his own modified design he had a photograph of the Grelle lamp post before him. He testified (page 131):

Q. Mr. Meyers, when you made that design for the lamp post, made your own design for the lamp posts, that is these drawings and specifications, is it not a fact that you had Mr. Grelle's photograph, or cut, or whatever it may have been, right alongside of you?

A. I had Mr. Grelle's photograph among the other views and cuts that I had.

Q. *You took a great liking, did you not, to the design of Mr. Grelle's in its general outlines?*

A. Why, I don't know as I took any special great liking to it. *I believe I rather liked the post the first time I saw it.*

Mr. Meyers made a strenuous but futile effort to show that he did not follow the Grelle design. His testimony bearing on this point was (page 132):

Q. Well, do you consider that the design, which you got up from an artistic standpoint, is superior to that which Mr. Grelle got up?

A. Well, I did not consider it so in a way, and yet in another way, too. The design that I got up I made a special effort outside of the artistic standpoint—I suppose perhaps in some people's eyes I destroyed the artistic appearance of the post by trying to make the post exceedingly plain so it would not catch dust, as practically or nearly to the extent that all the other posts would, with their extreme orna-

mentations. Leaving that off, I considered that I had a post that would present a much better appearance during the dusty summer.

Q. Well, is it not a fact, when you took a square surface and knocked off some of the corners, we get it towards the round?

A. I suppose that is true.

Q. Well, when you knock the corners you have less surface, have you not?

A. Well, I suppose you do, but if you leave the corners very rough and jagged, you will have lost the whole thing you are trying to gain.

Q. Well, of course, that part would be merely * * * a detail in finish?

A. Yes.

Q. But you will agree with me that a round surface has less area exposed to the collection of dust than any square surface, has it not?

A. Yes, providing it is round and smooth.

Q. Well, you can make any surface smooth, can you not, if you try?

A. Well, yes.

Mr. Meyers further testified (page 139):

Q. The main differences, that you have been speaking about here, as in your mind, changing defendants' lamp post from that of the plaintiffs' patented lamp post is with reference to the details, the panel work and cross section?

A. The entire appearance of the post, as it appears to the casual observer.

Q. Yes, but your main references are to these details, are they not?

A. Why, the details are largely effective in making up my conclusion.

Yes, sir.

When questioned as to what effect the Grelle design had on his own design, the Grelle design being at the time before him, he testified (page 142):

Q. Well, you had the Grelle design before you at the time?

A. I had the Grelle design as far as the photograph would give me the general appearance.

The witness had previously testified (page 125) that the sketch given him by Mr. Grelle "suggested generally the post as finally designed."

Witness further said (page 142):

"To what extent I may have been influenced by this particular design I could not say. I had it before me, but I did not wish to follow any of the lines that were presented in that design."

The dominant facts of the case are clearly stated in the opinion of the court below. From such opinion appellants quote the following as bearing on the issues raised in this appeal (page 174):

"The plaintiff, Charles Edward Grelle, invented and had patented an ornamental design

for lamp post, the patent bearing date March 12th, 1912, the application therefor was filed in the Patent Office January 2nd preceding. In December prior to such application, the defendant, City of Eugene, let a contract to Gross Brothers of that place for the manufacture of certain lamp posts designed by Alvin Meyers, who was the superintendent of the Water Board of the city." * * *

*It may be further noted that Meyers, in designing the lamp post for the city, had before him a photograph of the Grelle post, which has been designated at trial as type "S," AND ADOPTED some ideas from the type "S" post in working out his own design. Both designs of lamp posts consist of a base, a fluted cylindrical column, diminishing at the top, a shoulder or head from which four arms extend, and a single light with globe at the top. The four arms extend from the head or shoulder at an angle of 45 degrees, more or less, and curve downward at the outer ends, from which the lamps with globes are suspended. * * ** The only question (page 176) which I deem it necessary to pass upon under the view that I take of the case is whether the city's post is an infringement upon the type "S" post. * * * The only parts of the two posts *that bear marked similarity are the columns and the arms in their general longitudinal contour and declination to the shoulders of the post, and even as to these latter,*

the arms on the city's post at the outer extremity drop more abruptly, as has been previously observed, than the type "S" design. The base of the city's post is square, and the cap thereon is square, while the base of the type "S" post is cylindrical and fluted and the cap is round. The cap at the top of the column of the city's post is square, the shoulder is square, and the cap above is square. All these in the type "S" post are round or cylindrical. The arms of the city's post are square and paneled, while those of the type "S" post are cylindrical and fluted.

The plaintiff has introduced *comparative drafts of the mere outlines of the two posts*, which drafts it *must be admitted present great similarity and one cannot be readily distinguished from the other without giving particular attention to detail.* * * * The city's posts run predominantly in square surfaces, while cylindrical surfaces predominate in type "S," features that must catch the eye instantly and distinguish one from the other.

The conclusion of the court was that since (page 178) "the probability that the general purchaser would be misled or deceived in buying one of these posts for the other is very remote," the finding must be for defendants.

The errors assigned by appellants to these conclusions of the court are:

I.

The District Court erred in finding that the lamp post erected and used by defendants in said City of Eugene, Oregon, did not infringe upon the design patents of plaintiffs.

II.

The District Court erred in ruling (as in substance stated in the court's opinion) that while the designs of the plaintiffs' and the defendants' lamp post should be viewed as wholes without special attention to minutiae of detail or ornamentation, and while the outlines of said post present great similarity, and one cannot readily be distinguished from the other without giving particular attention to detail, nevertheless this is not a safe test, because the defendants' post runs predominantly in square surfaces while the cylindrical surfaces prevail in the plaintiffs' post, and therefore the defendants' post is distinguished from, and does not infringe upon the plaintiffs' patented post, and the bill of complaint is without equity and must be dismissed.

III.

The District Court erred in not finding that the defendants' lamp post does infringe the design patent of plaintiffs set forth in the bill of complaint herein.

IV.

The District Court erred in dismissing the bill of complaint herein without granting the plaintiffs any relief.

V.

The District Court erred in not granting to plaintiffs the injunction and the other relief prayed for in their bill of complaint herein.

ARGUMENT AND AUTHORITIES

The presumption of validity which attached to the granting of said patents to C. E. Grelle was not successfully assailed. The only question in the case, as correctly decided by the trial court, was whether the defendants' post infringed said patented design.

The court, in arriving at its conclusions, seems to resolve its doubt against the infringement, notwithstanding the "great similarity" in outline form of the two lamp posts, because in the Grelle lamp post the outline had been worked out in a thing of cylindrical cross section, while in the defendants' lamp post this outline was worked out in a thing of square cross section; and seemed further of the opinion that the test to be applied was whether the *general purchaser would be misled* or deceived in buying one of these posts for the other; and since, in the court's opinion, such result was remote, therefore the defendants' lamp

post did not infringe upon the Grelle patented design.

To the appellants it is quite clear that Meyers, in designing his post, tried to get as close as possible to the Grelle design without making a *Chinese* copy of the latter. And now, when his design is drawn into question, he is prepared to defend it on the same grounds so frequently introduced in unfair competition cases. As stated in one of the leading cases on this subject (*Enterprise Mfg. Co. v. Landers*, 131 Fed. 240, 241):

“Usually in these cases the defendants so dress their goods as to present a number of points of differences on which they rely when charged with intent to deceive, insisting that, although there may be resemblance, the differences are so great as to preclude any idea that they sought to produce confusion, *i. e.*, sought to imitate.”

The reason Meyers adopted the principle of the Grelle lamp post design obviously was this: He wanted to get a lamp post pleasing in form, but not patented. He considered the Grelle design original, so he concluded to imitate this in outline or general form, but to introduce variations in the cross sectional structure and in the surface ornamentation of the form, so that he could also escape any proprietary claims of the design on the part of Grelle.

The trial court was in error in applying to the question of infringement here involved the test, whether there was a probability of deceiving a person desiring to buy a lamp post of the Grelle design by substituting therefor one of the Meyers design. Indeed such deception would be quite possible if we imagine both lamp posts reduced to the size suitable for a table lamp. But this question is not an indispensable factor in any design patent infringement. The question is, has the patented thing been unlawfully appropriated?

In other words, proof of the probability of deception of a purchaser is not an essential ingredient in a suit for infringement of a design patent. There is no such limitation in the law. That is not the doctrine of *Gorham Co. v. White*, 14 Wall. 511. The question of deception has merely been introduced as a convenient rule which helps the solving of disputes concerning articles such as tableware, china, silver, etc.; in short, small articles made in quantities and bought by the general public. But patents for designs are also granted for things not so made and sold; *e. g.*, street lamp posts, usually purchased, as in the case here, by the city through an experienced buyer; frequently by an engineer accustomed to scrutinize the shapes and forms of things. So the construction of the patent statute, covering designs, contended for by appellants is, that *if it is found, by the eye of a person of ordinary intelligence, that the thing in ques-*

tion embodies a design plainly imitating the motive or principle of a patented design, infringement exists, regardless whether any purchaser will be deceived by the imitation or not.

In the Meyers lamp post the general outline of form and principle of the Grelle design is unmistakably and undeniably present. Meyers could not get away from that when he designed his own lamp post, because he had the Grelle design before him, and it was impressed on his mind. All Meyers succeeded in doing was to spoil the artistic features of the Grelle design. To use in substance the words of defendants' expert witness, Mr. Doyle (Trans., p. 96), the Meyers post "looks like a poor imitation of the Grelle post."

Can an infringer of a mechanical patent escape by making a poorly constructed imitation of the patented device? No, because the fact of infringement exists just the same. And there is no difference in this respect as to a poor imitation of a patented design.

The trial court further erred when it adopted as the reasons for its conclusions the fact that the parts made cylindrical in cross section in the Grelle design are made square in the Meyers design, notwithstanding such change still preserved the original outline form. As testified by all the expert witnesses, the cross section was merely a

matter of choice. Witness Hensill for defendants testified (page 90) as above mentioned:

Q. Now, is it not a fact, with a given outline I could say to you, "Mr. Hensill, I want that produced in square, or in octagon, hexagon, or elliptical, and you could design a lamp post to be manufactured from that outline in each case?"

A. Yes.

Witness Doyle, on being questioned as to the similarity of the two lamp posts, said (page 100):

Q. But now to you, in these two outlines, Mr. Doyle, is the one suggestive of the other, in your opinion?

A. *Yes, of course, they look very similar in outline.*

The fact, found by the trial court, that the extremities of the arms of the Meyers lamp post drop a little more abruptly than in the Grelle design is also negligible.

In *Bush & Lane Piano Co. v. Becker Bros.*, 207 Fed. 233, 234, the court said:

"To constitute infringement it is not absolutely essential that the defendants' design for its piano should be a Chinese copy of complainant's."

In *Gorham Co. v. White*, 14 Wall. 511, the Supreme Court said:

“The acts of Congress were intended to give encouragement to the decorative arts. * * *

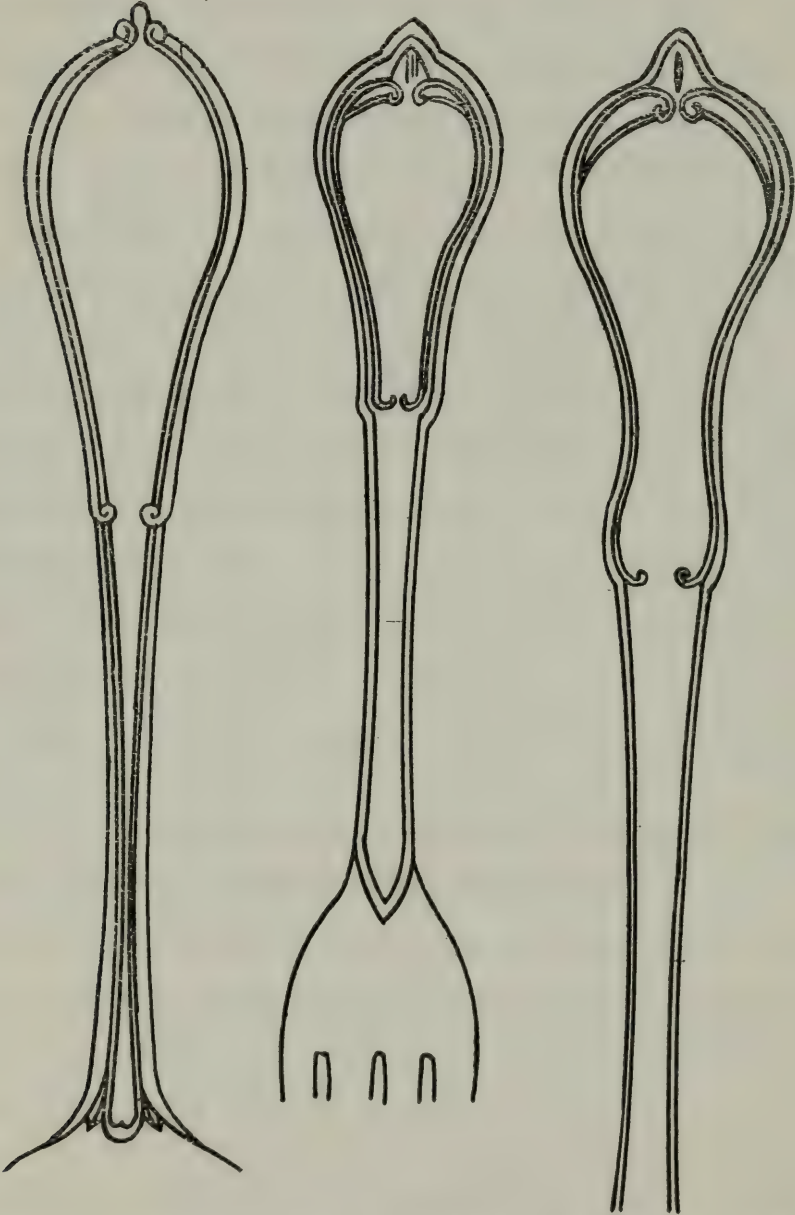
“In determining whether two designs are substantially the same * * * *the controlling consideration is the resultant effect.* * * *

“*All required is substantial identity between the two designs. The purpose of the law must be effected if possible; but plainly it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced* * * * *are sufficient to relieve an imitating design from condemnation as an infringement.*

“*Though variances in the ornament are discoverable, the question remains, is the effect of the whole design substantially the same?*”

There can be no better exposition of the full meaning of the Supreme Court's conclusions in this leading case than by reproducing here the two designs which such court had before it, and which it determined to be the same *in effect*, though varying in detail from each other, as apparent.

Copy of Cut printed in *Gorham v. White*
as reported in 14 Wall. (81 U.S.) 511, 521.



Gorham Co
(Pat.)

White, 1867.

White, 1868.

The differences discovered by experts in design cases are not received as tests of differences

by the courts. Design cases in this respect differ from cases involving mechanical patents.

Gorham Co. v. White, *supra*.

Appellants will now present their views on the law of design patents, but before doing so, and while the rules and views of the Supreme Court in the case of Gorham v. White are still fresh before us, appellants will again ask the court to view the two designs here in controversy, arranged side by side, as shown in the cut introduction of this brief. And since appellants claim that the particular design patented to Grelle relates to the outline form of lamp post, the court is also requested here to turn back for another glance at the exhibit above reproduced showing the outline forms of the conflicting lamp posts arranged side by side.

What Is The Law Governing Design Patents ?

Quoting in the first instance from Prof. Robinson's Work on Patents, Volume I, page 284, Section 200:

"A design is an instrument created by the imposition upon a physical substance of some peculiar shape or ornamentation which produces a particular impression upon the human eye, and through the eye upon the mind."

Section 201, page 286:

“A design is to be distinguished both from the elements of which it is composed and from the impression which it makes upon the mind of the observer.” * * *

“Each of its elements, when taken by itself, produces an impression on the eye. Combined together, each co-operates with all the others in the creation of a form or decoration which, taken as a whole, makes an impression entirely different from that of either of its separated elements. *The essence of a design*, therefore, resides not in its elements alone, nor in their method of arrangement alone, but in that appearance which results from the co-operation of these elements as they are employed in the design.” * * *

Section 204:

“A design may consist (1) in the simple configuration of a substance or *form given to it as a whole*, or (2) in the ornamentation imposed upon it without reference to its general form, or (3) in such configuration or ornamentation both. Thus *the essential characteristics of the appearance imparted to a substance may reside in its exterior outlines only*.” * * *

Section 206:

“If the idea embraces outline only, no change in decoration will disturb its identity unless the

apparent configuration of the substance be also changed." * * *

Section 207:

"The unity of a design remains unbroken, notwithstanding any changes in its elements, as long as its essential character as an appearance is preserved."

The act of February 4th, 1887, covering the infringement of design patents, provides:

"Be it enacted, etc., That hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or *any colorable imitation thereof*, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. * * *

"Sec. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed." * * *

The other provisions of the statute relating to design patents provide:

“Sec. 4929. Any person who has invented any new, original, and ornamental design for an article of manufacture * * * may upon * * * due proceedings had, the same as in cases of invention or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor.

“Sec. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the *exclusive right to make, use, and vend the invention* or discovery throughout the United States and the Territories thereof, referring to the specifications for the particulars thereof. A copy of the specifications and drawings shall be annexed to the patent and be a part thereof.”

In one of the first cases ever tried covering a design patent (*Root v. Ball & Davis*, Fed. Cas. No. 12035), the court held that

“To infringe a patent right, it is not necessary that the thing patented shall be adopted in every particular, but if, as in the present case, the designs and figures were substantially adopted by the defendants, they have infringed the plaintiff’s rights. If they adopt the same principal, the defendants are guilty. The prin-

cipal of a machine is that combination of mechanical powers which produce a certain result; and, in a case like the present, where ornaments are used for a stove, it is infringement to adopt the design so as to produce, substantially, the same appearance."

In the Gorham case it was held *not* identity, but *substantial* identity was all that was required to establish infringement or negative novelty.

Will the appellees contend that if Meyers' design had been evolved prior to the Grelle design the latter could have been patented because the claim could be made that the Grelle design was worked out in surfaces having *cylindrical* cross section, or because the extremities of the inclined arms were curved *less* than in the Meyers design?

In a recent case, *McBeth-Evans Glass Co. v. Rosenbaum Co.* (199 Fed. 154-164) the court said, with reference to a lamp shade:

"The principles upon which we may determine this controversy, as to infringement, are the same as those we have referred to for the purpose of determining the validity of the patent, except perhaps as to the use of expert testimony and observation of the manufactured article in use." * * *

If this question cannot be answered in the affirmative, then no more can it be held that the

Meyers design escapes condemnation as an infringement of the Grelle design merely because it has worked out its effect upon surfaces square in cross section, or made the curve at the end of the inclined arms more abrupt than in the Grelle design. For, as is evident, the outline form of the two lamp posts, viewed either from an angle, or from a position directly in front of them, is substantially the same.

In *Tompkinson v. Willets Mfg. Co.*, 23 Fed. 895, the court held:

“In approaching the question of infringement, the rule with reference to design patents should be kept steadily in view. *It is by no means necessary that the thing should be copied in every particular.* If the infringing design has the same general appearance, if the variations are slight, if to the eye of the ordinary person the two are substantially similar, it is enough. It is of no consequence that persons skilled in the art are able to detect differences.”

The principles of the law relating to patented designs are well understood by the courts, but in the application thereof an error is quite likely to occur, unless the application of the principle, involved in a given case, be placed side by side, as it were, with the patented design and the infringing article. This was done in the original

report of the Gorham case, but unfortunately is not generally done in the reports of design cases.

The appellants contend that each case must be considered by itself. That there are three general classes of designs, and the first step to be taken is to ascertain the class to which the particular design belongs: whether, 1, the impression produced by the design is a one of general effect—an outline form, or some other, general characteristic; or, 2, whether merely relating to some particular part of the thing, for example, a particular surface ornamentation; or, 3, whether both the outline-form and the surface ornamentations are to be considered. This statement will be recognized as substantially the rule laid down in Robinson on Patents, above quoted.

In the case at bar, we have only to deal with the first class, and a good illustration of what deviations from such a design—that is, one covering a general characteristic—will be disregarded is given in one of the earlier cases, Wood-Dolby, 7 Fed. 475. The description of the design there involved and the differences in the alleged infringing article, were clearly stated so as to be available, like the Gorham case, which it followed, as a guide for future adjudications.

The design here in question consisted of the representation of a bird upon a branch or twig, with a leaf above the bird, and a panel at the base of the twig, in white and gold colors, with

a diamond upon the leaf and two diamonds upon the panel. The court said, the defendant's wings *have "a setting of the same outline* as that represented in the orator's patent, representing a bird upon a branch or twig, with a leaf above the bird and a panel or a larger part of the branch in the shape of a panel, and two leaves at the base of the twig, in white or silver or gold colors, and a diamond upon the leaf above. There are two other leaves over the bird in the defendants' setting. The wings of the bird are in a different position from those of the bird in the plaintiff's setting, and the upper leaf is turned differently; but the two leaves below the bird in the defendants' setting are in white or silver color, and somewhat resemble the diamonds upon that part of the plaintiff's, and, all together, more is required than to observe and consider the artistic effect of each to bring these differences to notice. Looked at as ornaments desirable for their beauty or appropriateness according to the taste of the wearer, these differences in the details become immaterial."

In *Bush & Lane Piano Co. v. Becker Bros.*, 209 Fed. 233, the court held, to constitute an infringement of a design patent, it is not essential that defendant's design should be a *Chinese* copy of that patented, but it is sufficient if it imparts to the mind the same *general idea* of appearance.

In *General Gaslight Co. v. Matchless Mfg. Co.*, 129 Fed. 137, the court said: "The shape and

configuration of the lamp in its entirety, the collocations of its mechanical features, the arrangement of the cluster lights, * * * the contour and proportions of the bulbous globe all considered as contributing to design.”

The case of *Hutter v. Broome*, 114 Fed. 655, in a way explained the reason why courts in design cases frequently draw their analogy from the principles applied to cases of unfair competition:

“To determine whether a design infringes a design patent, we cannot look solely to the elements, nor the details in carrying out the parts of the design, but the test, (is) somewhat like that applied in the case of unfair competition” * * *;

and then comment on the fact that the observer “having been pleased with the general appearance” might, nevertheless, fail to be impressed by, or carry away the details of the design.

These observations apply to this case. Meyers was impressed by the motive of the Grelle design. He said:

“Why, at first, as I said before, I rather approved of Mr. Grelle’s design, (trans. p. 133) but as I went further on I did not approve of Mr. Grelle’s design, and went to the other extreme.”

Meyers said that his reason for departing from the Grelle design was, he wanted to produce "a post that would present a much better appearance during the dusty summer" (p. 132). He claimed to have attained this result in converting the cylindrical cross-section of the Grelle post into a square-cross, though he admitted that a round object had less surface than a square one (p. 132). And in fact all he succeeded in doing was to *spoil* the Grelle design. Meyers admitted he could not tell "to what extent he may have been influenced by this particular design" (p. 142). The fact is, *he imitated* this design; but from an artistic point of view he made a poor imitation. This was the verdict of Mr. Doyle, the architect, expert witness called by defendants. He, in characterizing the Meyers post, said, "*it looks like a poor imitation,*" and he had reference to the artistic effect. He said that the plaintiff's post is the best design, from an artistic standpoint, decidedly. (p. 96.)

In *Mygatt v. Zalinski et al.*, 138 Fed. 88, 89, the court said:

Slight changes are made which add nothing to the ornamentation, but *rather detract therefrom*. These, however, enabled the defendants to say, our shade or reflector is different from yours, therefore we do not infringe.

But the court found—

“The defendants are making and selling substantially what the complainant * * * is authorized by his patent to make and sell.

“True, * * * the angle is changed, the edge is curved or beaded and * * * there are other slight changes, *but these changes are evidently made to be used in justifying the infringement, if possible.*” * * *

In *Graff et al. v. Webster*, 195 Fed. 522, 524 (C. C. A., 2d Cir. 1912), the court—after referring to the fact that a number of articles were produced, together with drawings and engravings, each bearing certain features in common with the designs of the patents, but otherwise possessing marked dissimilarities—said: “*There is no reason, therefore, for limiting the patented designs to the identical structure shown and described,*” and followed this remark by quoting from the *Gorham* case: “The purpose of the law must be effected if possible; but plainly cannot be, if while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced * * * are sufficient to relieve an imitating design from condemnation as an infrinment. * * * The differences between the two designs are differences of detail, and not of substance.”

The two cases last cited point well to the conclusions which appellants contend for here. The

Meyers post was a modification of the Grelle design. The change detracted from the latter, and the change was unquestionably introduced by Meyers in order that he might say, as he has said: "Our (lamppost) is different from yours, therefore we do not infringe," applying, for illustration, the language of the court in *Mygatt v. Zalinski, supra*. And the defendants insisted that the Grelle design should be *limited* to the *identical* structure shown and described in the Grelle patent; and since Grelle, for artistic reasons probably, chose the cylindrical form, and Meyers the square, and because Grelle used a graceful curve for the extremities of his arms, while Meyers used an ungainly, abrupt curve—therefore the identity was destroyed and the defendants may escape. To adopt this contention of the defendants would be to disregard the rule on this point in the case of *Graff et al. v. Webster, supra*. In that case the court said: "There is no reason (which may be based on the proofs) for limiting the patented design to the identical structure shown and described." There was no reason shown in the case at bar. The Grelle design, taken as a whole, in its motive and outline-form effect was new. Mr. Doyle said with respect to this design, "They are new combinations * * * that I have never seen before." (p. 99.)

Would it carry out the purpose of the law to impose upon the design of the Grelle patent, the limitation contended for by appellees?

The appellants, in closing their argument, cannot present their position more forcibly than by quoting from the closing paragraph of the Supreme Court's opinion in the Gorham case:

The appellee's contention cannot be sustained, unless design patents of the character here in question are "to receive such construction that the act of Congress will afford no protection to the designer against the imitation of his invention."

The decree of the District Court should be reversed and the appellants granted the relief prayed for in their bill of complaint.

Respectfully submitted,

T. J. GEISLER,
Attorney and Counsel for Appellants.

Insert for Appellants' Brief in Cause No. 2456
pending in

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

BETWEEN CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY COMPANY, a Corporation,
Appellants,

v.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS,
Appellees.

Pursuant to the permission, given on the argument of this cause, appellants give below the cases which they cited in the trial court on the argument of the question of an alleged implied license, abandonment and estoppel, but omitted from their brief on appeal, because they assumed that the appellees had abandoned this position, in accordance with the views of the trial judge on this question.

The pleadings of the appellees (defendants) on these questions were: Par. IX. of Defendants' further and separate answer; (Trans. p. 42):

“IX.

“That the plaintiffs, by making a competitive bid to furnish the posts designed by said City, and by reason of the premises, licenses and permitted the defendants to manufacture and use said posts for the said street lighting system of defendant City.

“That by reason of the premises the plaintiffs have abandoned their patent and rights thereunder, so far as the same would interfere with

the defendants in installing the lamp post designed by said City.

“That by reason of the premises the plaintiffs are and ought to be estopped from claiming or asserting any rights under said pretended patent that would be in conflict with the right of defendants to manufacture said posts and install the same for said street lighting system of defendant City.”

In *Cayuta Wheel & Foundry Company v. Kennedy Valve Mfg. Company*, 127 Fed. 355, it was held, under a city charter which provided that no patent hydrant, valve or stop cock shall be used by the department of water supply unless the patentee or owner of said patent shall allow its use by said department without royalty, the fact that the owner of a patent for a hydrant made an unsuccessful bid to furnish said hydrants under a contract with the department, does not constitute an *abandonment* of or implied license under his patent.

In *Standard Sanitary Mfg. Co. v. Arrott*, 135 Fed. 750, 756,

“Where an estoppel is relied upon, the facts upon which it is based must be proved with particularity, and nothing can be supplied by inference or intendment.”

“In the absence of expressly proved fraud, there can be no estoppel based upon acts or conduct of the party sought to be estopped, where such conduct is as consistent with honest purpose or with an absence of negligence, as with their opposites.” *Ib.* 757.

Respectfully submitted,

T. J. GEISLER,
Attorney and Counsel for Appellants.

No. 2456

IN THE
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**CHARLES EDWARD GRELLE AND
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vs.

**CITY OF EUGENE, OREGON,
AND M. F. GRIGGS
APPELLEES**

Appeal from the District Court of the United States
for the District of Oregon

Brief of Appellees

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FILED

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Brief of Appellees

STATEMENT OF FACTS.

On the 2nd day of January, 1912, Charles Edward Grelle filed in the office of the Commissioner of Patents of the United States an application for letters patent to him on an ornamental lamp post which the said Grelle claims to have designed, a cut of which post will be found on page fifteen of appellant's transcript of record, and appellants' Exhibit "A" in the trial.

On March 12th, 1912, patent was issued to said Grelle covering said post. The patent was intro-

duced in evidence and marked "Plaintiffs' Exhibit S," and the post is afterwards referred to in said trial as Type "S" post.

The City of Eugene is a municipal corporation of twelve thousand inhabitants. The city owns and operates its own electric light plant for the purpose of lighting the streets, alleys and public parks of the city, and selling electricity to the inhabitants thereof. The operation of the electric lighting plant is under the immediate control of the Eugene Water Board, a body created and existing under the charter and ordinances of the city. The city, through its water board planned to light the principal streets of the city by means of light posts, doing away with the old arc light system, and to that end the water board asked for bids from various concerns for furnishing light posts to the city. Charles Edward Grelle was at that time, and at the time of the trial of this cause, president and manager of the Independent Foundry Company. The Independent Foundry Company had the exclusive right and license to make and sell the type "S" post designed by Mr. Grelle.

Alvin Meyers, who was then the superintendent of the water board of the city, at the instance of the water board, designed a lamp post and submitted the same to the water board. The water board accepted the design of Mr. Meyers and called for bids for manufacturing the same. The Independent Foundry Company submitted bids for the manufacture of the post designed by Mr. Meyers, and also submitted an alternative bid on their type "S" post. Gross Brothers, who were in the foundry business in the

City of Eugene, also submitted a bid for the manufacture of the post designed by Mr. Meyers, and the water board considering the bid of Gross Brothers the best bid, awarded the contract to them December, 1911, for the manufacture of the post designed by Mr. Meyers.

The appellants in this case at the time they filed this suit against the City of Eugene also filed a similar suit against Gross Brothers to enjoin them from manufacturing the posts. The questions involved in the two cases being identical the cases were consolidated.

The contract to Gross Brothers was let before Mr. Grelle applied for a patent on his type "S" post. It is the contention of appellants that the post designed by Mr. Meyers is an infringement upon the patent obtained by Mr. Grelle on the post designed by him, and the appellants ask that the defendants be enjoined from making or selling the post designed by Mr. Meyers, and ask that the defendant City of Eugene be enjoined from using or maintaining said posts, or from furnishing electricity or other lighting agent to light the post erected in the city; and further, that the appellant recover from the City of Eugene the sum of \$250.00 for each and every unlawful act in selling that post infringing upon said patent of Mr. Grelle; and asked further that the city be compelled to account for and pay over all profits which the city has received by reason of its alleged infringement.

The case was tried before Honorable Charles E. Wolverton, Judge, and a decree rendered in favor of appellees and against appellants. The court held

that the post designed by Mr. Meyers did not infringe upon the post designed by Mr. Grelle.

POINTS AND AUTHORITIES.

The design law was intended to encourage the decorative arts, and therefore deals with the appearance rather than the structure, use or functions of the article. The design must be novel and must have called for an exercise of the inventive faculties as distinguished from ordinary mechanical skill. There must be something akin to genius. An effort of the brain as well as of the hand.

30 Cyc, 827 and 849.

Smith v. Whitman Saddle Company, 148 U. S. 674; 37 L. E. 606.

The patent must be of such a character as to have called for an exercise of the inventive or creative faculties of the mind as distinguished from the mere exercise of the knowledge and judgment expected of those skilled in a particular art.

30 Cyc, 828.

Pearce v. Mulford, 102 U. S. 112; 26 L. E. 93.

The design must be novel and must have called for the exercise of the inventive faculties as distinguished from ordinary mechanical skill.

Smith v. Whitman Saddle Company, 148 U. S. 674.

General Gas and Light Co. v. Matchless Mfg. Co., 129 Fed. 137.

Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co., et al., 114 Fed. 362.

Cary Mfg. Co. v. Neal, 98 Fed. 617.

Mere novelty and utility are not enough to sustain a patent, since there must also be invention.

Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554; 29 L. E. 952.

Thompson v. Boisselier, 114 U. S. 1.

Glue Company v. Upton, 97 U. S. 3.

Mere mechanical skill is not sufficient but the design must be new and novel and as a result of the inventive genius rather than mechanical skill.

Black Diamond Coal Min. Co. v. Excelsior Coal Co., 156 U. S. 611; 39 L. E. 553.

Knapp v. Morss, 150 U. S. 221; 37 L. E. 1059.

Burt, et al., v. Ivory, et al., 133 U. S. 394.

Hill, et al., v. Wooster, 132 U. S. 693.

The later cases incline toward requiring more inventive skill for design patents than did the earlier ones.

Perry v. Haskins, 111 Fed. 1002.

Crier v. Innes, 160 Fed. 103.

Bolt Company v. Company, 194 Fed. 871.

Mygat v. S. F. Co., 191 Fed. 836.

Palouze Co. v. A. C. Co., 102 Fed. 916.

Phoenix Co. v. Company, 194 Fed. 703.

Phoenix Co. v. Rich, 194 Fed. 708.

The designs should be viewed as wholes, considering their general appearance as they present themselves to the eye of the observer, without special attention to *minutia* of detail or ornamentation.

Hutter v. Broome, 114 Fed. 655.

Byron v. Friedberger, 87 Fed. 559.

Phoenix Co. v. Rich, 194 Fed. 708.

Graff, etc., v. Webster, 189 Fed. 902; 195 Fed. 522.

Gorham v. White, 14 Wall. 511; 20 L. E. 731.

McClain v. Fleming, 96 U. S. 245 (256).

Williams Co. v. N. M. Co., 136 Fed. 210.

West Co. v. Frank, 146 Fed. 388.

F. A. Co. v. Chapin, 151 Fed. 264.

ARGUMENT.

In our opinion there are two vital questions involved in this case:

First: The post designed by Grelle is not subject to patent. The most that can be claimed for it is that it is merely the result of mechanical skill.

Second: That the city's post is not an infringement upon the post designed by Grelle.

This case was decided by the trial court upon the question of infringement, the court holding that the city's post did not infringe Grelle's type "S" post. The evidence shows in this case that before the contract was awarded to Gross Brothers for the manufacture of the city's posts and before Mr. Grelle had applied for letters patent, specifications of the post designed by Meyers and referred to throughout the

case as the city's post, were submitted to the Independent Foundry Company, of which Mr. Grelle is manager and president, for bids, and the Independent Foundry Company submitted a bid for the manufacture of the city's post. The bid was submitted by the Independent Foundry Company through Grelle, and neither Grelle nor the Independent Foundry Company intimated that Mr. Grelle intended to apply for a patent on his design, or that the city's post was an infringement upon the type "S" post, but without a word of protest Grelle and Independent Foundry Company entered into open competition for the manufacture of the city's posts. The bid submitted provides:

"We propose to furnish you ornamental street posts as per your specifications on December 7, 1911, and according to your drawings of your standard ornamental post as follows."

Then follows the price paid, and further the bid provides:

"Also beg to submit alternative quotation on our type "S" post of which you have photograph."

Then follows price on type "S" post. The fact that the Independent Foundry Company, through Grelle, proposed to manufacture the city's posts and openly submitted a bid for the manufacture of said posts and not disclosing to the city that he, Grelle, intended to apply for a patent for his post and without claiming or intimating that the post designed by Mr. Meyers was an infringement on his post, shows bad faith on the part of Grelle. The contract was awarded to Gross Brothers in December, 1911,

and Grelle did not apply for Letters Patent until January, 1912. Grelle's post is not subject to patent for the reason that it is neither new or novel or the result of inventive genius. It is even doing violence to concede that it is the result of mechanical skill, but conceding for the sake of the argument that a type "S" post is the result of mechanical skill, that being so, the post so designed would not be subject to patent.

Wade H. Pipes, architect and witness on behalf of appellees, testified as follows:

"Q. Is there anything novel or new in either one of these lamp-posts in the parts?

A. No, there is not. Similar designs have been made all over the country.

Q. For how long?

A. Well, the top part of this sort of posts has not been in use a great many years. They have been in use since they used to use the old kind of electric lights, that dropped down on a wire. When those went out of date, these began to come in, and they used to twist them up on the pole—an arc light.

Q. Is there anything novel in the fluted column?

A. Well, the fluted Doric column is as old as Greek civilization nearly. I guess it is as old.

Q. You say all these lamp-posts evolve or develop from the column?

A. Yes, they all have the base.

Q. Have you a picture of any architecture—any column there, that would illustrate what you mean?

A. I have a column here that is about 400 years old.

Q. What building is that?

A. Let me see if the name of it is here. Well, it is an English country house, one of the old ones.

Q. How old is it?

A. It is about 400 years old.

Q. Is this from "Country Life"?

A. Yes.

Q. An English publication?

A. Yes."

The testimony of Mr. Pipes will be found on pages 157 and 158, of the transcript of record. Mr. Pipes says the fluted Doric column is as old as Greek civilization and exhibited a cut of a column about 400 years old. It is very difficult indeed to say the number of years that lamp-posts have been in existence, but it is needless to argue that there is anything new or novel concerning the design of a lamp-post. They are as old and ancient as the hills. There is also necessarily a great similarity between all types of light posts, and that being so, the type "S" post is not subject to patent.

In the case of *Hill, et al., v. Wooster, supra*, the court says:

"This court, however, has repeatedly held that under the Constitution and the acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof, and that it is not enough that a thing shall be new in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must under the Constitution and Statute amount to an invention or a discovery."

In the case of *Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co.*, *supra*, the learned judge says:

“But irrespective of prior patents and other sufficiently proven exhibits, the defense of lack of patentable novelty stands on a broader foundation than the proof produced in court. In design patents the test of identity, on questions of anticipation and infringement, is the eye of the ordinary observer. And in determining this question the court may avail itself of such common knowledge as is possessed by the general public. The fundamental question is whether the inventive faculty has been exercised to produce anything which is original and pleasing to the eye. The eyes of the court cannot be closed to the fact that in the court room itself are electric light fixtures, placed there long before the date of the patent, which show a sphere with a neck and rim so nearly identical with those of the patent that the difference is a mere matter of immaterial proportion. Nor can the andirons of our grandfathers, the door-knob from time immemorial, the old chime bell of the sleigh, the conventional cuspidor, be overlooked. The court must take judicial notice of the oblate spheroid and neck common to the whole field of everyday arts and must hold that this design is merely a double use,—is, at most, the adaptation of an old form to a new purpose. The defense of want of patentable novelty is sustained.”

In the case of *Knapp v. Morss*, *supra*, the court, among other things, says:

“All that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention but only the exercise of ordinary mechanical skill; and his right to a

patent must rest upon the novelty of the means he contrived to carry his idea into practical application."

Grelle's type "S" post is an ordinary five-light post with round base and round column and round arms. Such posts have been in use, no doubt, for a great many years. The city's post is an ordinary five-light post with square base, round column and square arms. Neither post is new or novel or is it the result of any inventive genius and we may add, the designing of these posts require but very little mechanical skill. We are safe in saying that any person possessing ordinary mechanical skill could very easily design different types of light posts.

The evidence shows that the posts are essentially and materially different. The difference can be seen at once from a merely casual observation or comparison between the two posts. The post designed by the city is square at the base with square block panels, and the top and bottom ornamentation of the base is entirely different. The column of the city's post is round and fluted, the head is square with square paneled features in both the head of the post and the arms. The head and arms of the type "S" post are round and fluted. The difference between the two posts is very clearly stated in the opinion of Honorable Charles E. Wolverton, the trial judge, which is as follows:

"The base of the city's post is square in form, with paneling for ornamental appearance. At the top of this is a cap, which is also square, above which rests the column. It has a cap at the top of the column the same as the type 'S' post, but this cap is square in form. The shoulder

or head is also square, and the cap above that is square. The arms are also square, with panel ornamentation, and the curves at the outer extremities drop a little more abruptly than those of the type 'S' pattern."

Y. D. Hensill, a witness for the appellees, in describing the difference between the two posts testified as follows:

"The type 'S' post has a round base, with more moldings than the city's post. The type 'S' post has a fluted base. The city's post is square, with a square sunk panel. The type 'S' post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type 'S' post has a round cap or head. The city's post has a square, with sunk panels. The type 'S' post is ornamental. There is a difference in the shape of the arms. One is round—the type 'S' post is round, increasing to elliptical, while the city post, the city arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm."

(The particular testimony of the witness referred to will be found at page 86, of the transcript of record.)

Wade H. Pipes, witness on behalf of the appellees, also clearly defined the difference between the two posts. Mr. Pipes says:

"The city's post is a much coarser motive altogether. This (meaning the type 'S' post) is more refined. Of course, all of these posts are based on a column. The column has been in use for hundreds of years. But these posts are about as dissimilar as lamp posts could be. Of course, all cities, both in America and Europe, have agreed pretty much about what a post

ought to be in its general form. There is not very much chance for originality in that line at all. The only chance for originality the designer has in designing a post is in the detail."

And the witness testifying further says:

"Q. Well, now, would those posts be likely—would the difference be noted by a casual observer, in those posts, in your opinion?

A. Well, I should think it would.

Q. Have you examined the top of the type 'S' post and the city's post here in the court room?

A. Yes.

Q. Would a purchaser be likely to be deceived by the city's post?

A. That would be impossible.

Q. Would you say that one was a copy of the other in any way?

A. I cannot see how it would be.

Q. Is there anything novel or new in either one of these lamp-posts in the parts?

A. No, there is not. Similar designs have been made all over the country.

Q. For how long?

A. Well, the top part of this sort of posts has not been in use a great many years. They have been in use since they used to use the old kind of electric lights, that dropped down on a wire. When those went out of date, these began to come in, and they used to twist them up on the pole—an arc light.

Q. Is there anything novel in the fluted column?

A. Well the fluted Doric column is as old as Greek civilization nearly. I guess it is as old.

Q. You say all these lamp-posts evolute or develop from the column?

A. Yes. That all have the base.

Q. Have you a picture of any architecture—any column there, that would illustrate what you mean?

A. I have a column here that is about 400 years old.”

And the witness further testifying says:

“The general impression is the same, but to any designer, although those mouldings seem just very similar there on a small scale drawing like this is, if you draw that the full size, you would see a very great deal more difference than that.”

The test is, are the designs substantially the same?

Would the ordinary observer giving the attention a purchaser usually gives, purchase one supposing it to be the other? The leading case upon this question is the case of *Gorham v. White*, 14 Wall. 511.

In this case the court holds (Page 528) :

“We hold, therefore, that if, to the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.”

The appellant introduced in evidence comparative drafts of the outline of the two posts. But, as the court holds, this cannot be a safe test. It is the constructed post as it appears to the eye of the ordi-

nary or casual observer, and when so viewed the two posts are readily distinguishable.

We are safe in saying that the evidence shows conclusively that the constructed posts are essentially different, and in addition to the testimony of the witnesses the posts were brought into the court room and exhibited at the trial of this case, and the court from a comparison could readily see that the posts were essentially different.

We respectfully submit that under the evidence the decree rendered in the District Court should be affirmed.

Respectfully submitted

G. F. SKIPWORTH,

JOHN M. PIPES,

Solicitors for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. VAN LUVEN, as Trustee in Bankruptcy of the
Estate of W. L. HOLMAN COMPANY, a
Corporation,

Appellant,

vs.

C. F. BULOTTI and H. R. NOACK,

Appellees.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 7936—IN BANKRUPTCY.

EXHIBIT "A."

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,

Bankrupt.

**Praecipe for Transcript of Record for Use on
Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used by the undersigned trustee on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under Section 24a of the Bankruptcy Act, from that certain order of the above-entitled court made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, denying the petition in intervention of C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Company, a corporation, and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate.

Please include in the said transcript of record the following documents:

- (1) This Praecipe.
- (2) Petition for order to show cause on Pacific Coast Casualty Co.

- (3) Order to show cause on Pacific Coast Casualty Co.
- (4) Answer of Pacific Coast Casualty Co. to order to show cause.
- (5) Petition in intervention of C. F. Bulotti and H. R. Noack. [1*]
- (6) Statement of evidence as per statement lodged herewith or as finally settled by the District Judge.
- (7) Order of referee denying petition in intervention.
- (8) Petition of C. F. Bulotti and H. R. Noack to review referee's order.
- (9) Certificate of referee on review.
- (10) Supplemental certificate of referee on review.
- (11) Opinion and order of District Judge reversing order of referee.
- (12) Petition for and allowance of appeal.
- (13) Assignment of errors on appeal.
- (14) Citation on Appeal.

Dated, June 19th, 1914.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee of the Estate
of the Above-named Bankrupt.

Receipt of a copy of the foregoing praecipe is
hereby admitted this 19th day of June, 1914.

MANSFIELD & NEWMARK,
Attorneys for the said C. F. Bulotti and H. R.
Noack.

*Page-number appearing at foot of page of original certified Record.

[Endorsed]: Filed Jun. 19, 1914, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

(Title of Court and Cause.)

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between C. F. Bulotti and H. R. Noack, and H. Van Luven, as trustee of the estate of the above-named bankrupt, that in making up the record on appeal by the said trustee in bankruptcy from the order of the above-entitled court made herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esqr., a referee in bankruptcy of the said court, denying the petition in intervention of the said C. F. Bulotti and H. R. Noack, that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Co. and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate, the clerk of the above-entitled court shall, in following the Praecipe now on file herein, omit the full title of court and cause except upon the said praecipe and thereafter refer to the same simply as: "Title of Court and Cause," and omit all verifications and refer to the same simply as "Duly Verified," and where an exhibit is incorporated in and made a part of another exhibit, omit such exhibit from such other exhibit and refer to the same as follows: "(Here follows Exhibit No. —)."

Dated: July 14th, 1914.

MANSFIELD & NEWMARK,
Attorneys for C. F. Bulotti and H. R. Noack.

HENRY G. W. DINKELSPIEL,

J. M. THOMAS,

REUBEN G. HUNT,

Attorneys for Trustee in Bankruptcy.

[Endorsed]: Filed Jul. 15, 1914, at 12 o'clock and 20 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [3]

(Title of Court and Cause.)

Stipulation as to Record on Appeal.

The original papers having been lost or mislaid, it is hereby stipulated that attached hereto are true and correct copies of the following papers mentioned in the Praecipe now on file herein or appeal by H. Van Luven, trustee of the estate of the above-named bankrupt, to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the order of the above-entitled court made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, denying the petition in intervention of C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Company and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate:

- (1) Petition for order to show cause.
- (2) Order to show cause.

- (3) Answer of Pacific Coast Casualty Co. to order to show cause.
- (4) Petition in intervention of C. F. Bulotti and H. R. Noack.
- (5) Order of referee denying petition in intervention.
- (6) Petition for review of order of referee.

and that the copies of such papers attached hereto shall be used by the clerk of the above-entitled court in the form therein set forth in making up the record on said appeal in accordance with the said Praeceptum.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for the said Trustee in Bankruptcy.

MANSFIELD & NEWMARK,
Attorneys for C. F. Bulotti and H. R. Noack. [4]

EXHIBIT "B."

(Title of Court and Cause.)

Petition for Order to Show Cause.

The petition of H. Van Luven respectfully shows:

That he is now and ever since the 24th day of April, 1913, has been the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt,

That the Pacific Coast Casualty Company has in its possession or under its control the sum of \$1,179.60, which belongs to the estate of the above-named bankrupt, but the said corporation refuses to deliver the same to the trustee.

WHEREFORE, said trustee prays that an order

to show cause may be issued herein directing the said corporation to appear before the Referee at a time and place fixed in said order and then and there to show cause why said money should not be paid over to the trustee herein.

H. VAN LUVEN,
Trustee of the Estate of the Above-named Bank-
rupt.

(Duly verified.) [5]

EXHIBIT "C."

(Title of Court and Cause.)

Order to Show Cause.

Upon reading and filing the petition of the trustee herein praying for an order to show cause upon Pacific Coast Casualty Company, and good cause appearing therefor,

IT IS HEREBY ORDERED that the said Pacific Coast Casualty Company be, and it is hereby directed to appear before the undersigned referee at his office Room 213 United States Postoffice Building, Seventh and Mission Streets, San Francisco, California, on Wednesday, the 14th day of May, 1913, at 10 o'clock A. M., then and there to show cause, if any there be, why the prayer of said petitioner should not be granted; and,

IT IS HEREBY FURTHER ORDERED that a copy of the said petition be served with this order to show cause for the information of said corporation.

Done in open court this 8th day of May, 1913.

ARMAND B. KREFT,
Referee in Bankruptcy. [6]

EXHIBIT "D."

(Title of Court and Cause.)

Answer of Pacific Coast Casualty Co. to Order to Show Cause.

Comes now Pacific Coast Casualty Company, a corporation, and answers the petition heretofore filed herein and alleges that it is a corporation organized and existing under and by virtue of the laws of the State of California;

That on or about the 11th day of June, 1912, W. L. Holman Company, the bankrupt above named, entered into a contract with the City and County of San Francisco, State of California, wherein and whereby said W. L. Holman Company agreed to construct for said City and County of San Francisco forty-three (43) cars for the Municipal Railway;

That said W. L. Holman Company were required to furnish a bond running to said City and County of San Francisco conditioned that said W. L. Holman Company perform and complete the terms of said contract;

That said W. L. Holman Company requested Pacific Coast Casualty Company to furnish for it and to execute and deliver said bond to said City and County of San Francisco as a surety of the said W. L. Holman Company, and on the 11th day of June, 1912, said Pacific Coast Casualty Company did execute and deliver to the City and County of San Francisco as surety for the said W. L. Holman Company said bond;

That on the 11th day of June, 1912, in consideration of the execution of the said bond by said Pacific

Coast Casualty Company said W. L. Holman assigned to the Pacific Coast Casualty Company all moneys payable by the City and County of San Francisco under said contract with W. L. Holman Company for the construction of said cars, in trust, to be distributed among the [7] creditors furnishing labor and material used in the construction of said cars, and that it was then and there agreed that said moneys should be paid by the Pacific Coast Casualty Company to such creditors furnishing labor and material for the construction of said cars, and that the surplus, if any, remaining after the payment of all of such claims for labor and material should be paid to W. L. Holman Company;

At the time of making the said assignment W. L. Holman Company made, executed and delivered to Pacific Coast Casualty Company certain instruments in writing in the words and figures following:

(Here follows Trustee's Exhibits Nos. 2 and 3, contained in Exhibit "F.")

That said W. L. Holman Company has contracted debts for labor and material used for the construction of said cars in a sum exceeding the total amount paid and to be paid under said contract with the City and County of San Francisco and there is and will be no surplus after such claims for labor and material are paid;

That the sum of Eleven Hundred and Seventy-nine and 68/100 (\$1179.68) Dollars now in the possession of the Pacific Coast Casualty Company, and referred to in said petition filed herein, was received from the City and County of San Francisco under said assignment from W. L. Holman Company here-

inabove referred to and that said sum and all thereof is needed to pay the claims for labor and material furnished for the construction of said cars, and said sum, and all thereof, is held in trust by the Pacific Coast Casualty Company for the payment of claims for labor and material used in the construction of said cars;

WHEREFORE, said Pacific Coast Casualty Company prays that the order to show cause heretofore issued herein be discharged and that it be ordered and decreed that the trustee of the estate of the above-named bankrupt has no interest, right or [8] claim in or to said sum of Eleven Hundred and Seventy-nine and 68/100 (\$1,179.68) Dollars.

FRANK P. DEERING,

Attorney for Pacific Coast Casualty Company.
(Duly verified.) [9]

EXHIBIT "E."

(Title of Court and Cause.)

Petition in Intervention of C. F. Bulotti and H. R. Noack.

Come C. F. Bulotti and H. R. Noack, and by leave of Court first had and obtained, specially appear on behalf of and as trustees and representatives of certain persons, firms and corporations hereinafter mentioned, and intervening in the matter of the petition of H. Van Luven, trustee of the estate of the above-named bankrupts, for an order directing the Pacific Coast Casualty Company to pay over to said trustee the sum of \$1179.68, and hereby consenting to the jurisdiction of this court to try, hear and de-

termine the title to and the right to the possession of said sum of \$1179.68, but expressly reserving the right to object to the jurisdiction of this Court to try, hear or determine any controversies or matters relating, referring to or growing out of any other funds or moneys due or to become due from the City and County of San Francisco under a certain contract with the above-named bankrupts, hereinafter referred to, and expressly reserving all objections to the jurisdiction of this Court to try, hear or determine any other controversies or matters, whatsoever, relating to said intervenors, or to said persons, firms and corporations so represented by said intervenors, respectfully represent:

That on or about the 11th day of June, 1912, W. L. Holman Company, the bankrupt above named, entered into a contract with the City and County of San Francisco, State of California, wherein and whereby said W. L. Holman Company agreed to construct for said City and County of San Francisco forty-three (43) cars for the Municipal Railway;

That said W. L. Holman Company were required to furnish a [10] bond running to said City and County of San Francisco conditioned that said W. L. Holman Company perform and complete the terms of said contract;

That said W. L. Holman Company requested Pacific Coast Casualty Company, a corporation, to furnish for it and to execute and deliver said bond to said City and County of San Francisco as a surety of the said W. L. Holman Company, and on the 11th day of June, 1912, said Pacific Coast Casualty Company did execute and deliver to the City and County

of San Francisco as surety for the said W. L. Holman Company said bond;

That on the 11th day of June, 1912, all moneys payable by the City and County of San Francisco under said contract were assigned, transferred and set over by said W. L. Holman Company to said Pacific Coast Casualty Company for the use and benefit of the persons, firms and corporations furnishing labor and material used in the construction of said cars, and it was then agreed that said moneys should be paid by the Pacific Coast Casualty Company to such persons, firms and corporations furnishing labor and material for the construction of said cars, and that the surplus, if any, remaining after the payment and satisfaction of all of such claims for labor and material should be paid to W. L. Holman Company;

That at the time of making the said assignment W. L. Holman Company, made, executed and delivered to Pacific Coast Casualty Company certain instruments in writing in the words and figures following:

(Here follows Trustee's Exhibits Nos. 2 and 3 contained in Exhibit "F.")

That as your intervenors are advised and believe, and therefore allege, some time in the month of December, 1912, the said W. L. Holman Company sublet to the Union Iron Works of San Francisco the construction of 23 of said cars and the said W. L. Holman constructed, and thereafter delivered [11] to the City and County of San Francisco 20 of said cars;

That at various dates subsequent to June 11th, 1912, the following persons, firms and corporations

furnished labor and sold and delivered to said W. L. Holman Company materials, which labor and materials were intended to be used and were actually used in the construction of and form a permanent part of said 20 cars so constructed and delivered by said W. L. Holman Company in the amounts and for the sums as hereinafter set opposite the respective names of said persons, firms and corporations, to wit:

Names.	Amounts.
Australian Hardware Co.....	\$ 140.58
Adams & Westlake Co.....	501.82
Berger & Carter Co.....	79.46
Bass-Hueter Paint Co.....	193.62
Brill Co., J. G.....	15,875.84
Boyd & Moore.....	448.64
Boesch Lamp Co.....	8.25
Cook Belting, H. N.....	13.65
Curtain Supply Co.....	1,318.40
Columbia Steel Company.....	1,861.56
Cottier Ventilating System.....	495.80
California Air Purifying Co.....	343.91
David Foundry Co.....	453.78
Degen Belting Co., L. P.....	5.00
Eccles & Smith Co.....	1,122.74
Edminster, O. M.....	110.80
Evans & Co., C. H.....	428.20
Eclipse Ry. Supply Co., The.....	1,000.00
Enterprise Foundry Co.....	353.35
Fuller Co., W. P.....	1,093.86
Foucar, Ray & Simon.....	.58
Greenberg's Sons, M.....	1,799.59
James Graham Manufacturing Co.....	9.91

Names.	Amounts.
General Ry. & Supply Co.....	689.44
Hale & Kilburn Co.....	5,212.00
Hibernia Sheet Metal Works.....	110.50
Judson Mfg. Co.....	3,318.09
Johnson Fare Box Co.....	1,746.17
Kitchen & Son.....	20.62
Mortenson Construction Co.....	178.15
Mark-Lally Co.....	327.50
Marwedel, C. W.....	42.84
McNutt Kahn Co.....	8.50
Montague & Co., W. W.....	614.37
Meyercord Co.	278.25
Mallott & Petersen.....	155.00
McNab & Smith	42.85
Meese & Gottfried Co.....	.26
Payne's Bolt Works.....	243.43
Pacific Hardware & Steel Co.....	1,698.40
Pierson, Roeding & Co.....	194.00
Pope & Talbot.....	1,014.00
[12]	
Pantasote Co.	675.89
Plant Rubber Co.....	51.69
Pacific Tool & Supply Co.....	4.24
Ruegg, Anton	4.50
Railway Improvement Co.....	120.00
Symon Brothers	425.64
Standard Oil Co.....	114.99
S. F. Pioneer Varnish Co.....	144.25
Steiger & Kerr Co.....	134.80
Selby Smelting & Lead Co.....	10.56
S. F. Brazing & Welding Co.....	8.00

Names.	Amounts.
Taylor & Spottswood Co.....	858.33
Van Arsdale-Harris Lumber Co.....	706.80
White Bros.	5,185.74
Westinghouse Mfg. Co.....	63,858.72
Wilbert, F. V.....	28.00
Western Brass Company.....	390.20
Weeks-Howe-Emerson Co.	4.04
Western Union Telegraph Co.....	.61
West Coast Wire & Iron Works.....	107.20
Pacific Gas & Electric Co.....	111.00
Merchants' National Bank.....	10,000.00
Rios, A.	500.00
The A. T. & S. F. Ry. Co.....	16.90
Pacific Telephone & Telegraph Co.....	14.66

That under and in pursuance of said agreement hereinabove set forth the said Pacific Coast Casualty Company collected from said City and County of San Francisco the first payment due from the City and County of San Francisco under said contract, and of which sum so paid to said Pacific Coast Casualty Company the said sum of \$1,179.68 is a part and portion;

That prior to the 7th day of January, 1913, your intervenors and A. F. Irwin were appointed a committee to represent and act for said persons, firms and corporations so furnishing labor and material in the construction of said 20 cars;

That on the 7th day of January, 1913, the said Pacific Coast Casualty Company and the said creditors' committee entered into a certain agreement in the words and figures following, to wit:

(Here follows Trustee's Exhibit No. 5, contained in Exhibit "F.")

That said creditors' committee demanded of said Pacific Coast Casualty Company the said sum of \$1,179.68;

That thereafter, acting under and in pursuance of the [13] agreements hereinabove set forth, the said creditors' committee received the second and third payments due from the City and County of San Francisco under said contract aggregating the sum of \$69,300.00, and in pursuance of said agreements distributed pro rata among said persons, firms and corporations a sum equal to forty-six (46) per cent of their respective claims and demands as hereinabove set forth, and there is now due and unpaid to said persons, firms and corporations upon their said claims and demands a sum equal to fifty-four (54) per cent of the amount of their respective claims for said labor and materials so furnished;

That the total amount of money paid and to be paid under said contract with the City and County of San Francisco for the construction of said 20 cars is less than the total amount of said claims for said labor and materials so furnished in the construction thereof and there will be no surplus out of said funds accruing or to accrue from said City and County of San Francisco for the construction of said 20 cars after said claims for labor and material have been paid, and there will be no balance remaining out of the moneys arising under said contract to be paid to said W. L. Holman Company after the satisfaction of said claims;

That after the 7th day of January, 1913, said A. M. Irwin resigned as a member of said creditors' committee;

WHEREFORE, your intervenors pray that said sum of \$1,179.68 be delivered over unto them as the representatives and agents of said creditors so furnishing material and labor in and about the construction of said 20 cars.

Dated June 7th, 1913.

C. F. BULOTTI,
H. R. NOACK,
Intervenors.

(Duly verified.) [14]

EXHIBIT "G."

(Title of Court and Cause.)

Order Denying Petition in Intervention.

H. Van Luven, the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt, having filed herein on the 8th day of May, 1913, his duly verified petition praying that the undersigned referee issue an order directing the Pacific Coast Casualty Company, a corporation, to appear before the said referee and show cause, if any there be, why it should not pay over to the said trustee, the sum of \$1,179.68 moneys alleged by the said trustee to belong to the estate of the bankrupt but in the possession or under the control of the said company, and said order having been duly issued,

And the said corporation having, on the 22d day of May, 1913, filed herein its return to the said order to show cause wherein it alleges that the said sum

of \$1,179.68 is a balance of a fund remaining in the hands of the said corporation by reason of an assignment by the bankrupt to the said corporation made on the 11th day of June, 1912, and which said fund the said surety company holds in trust for the payment of all claims for labor and material furnished to the said bankrupt and used in the construction by the said bankrupt of a certain twenty (20) street-cars for the City and County of San Francisco, a municipal corporation, under a contract between the bankrupt and the said municipal corporation for the faithful performance of which said contract the said Pacific Coast Casualty Company as surety executed and delivered to the said municipal corporation a bond in the sum of \$50,000.

And C. F. Bulotti and H. R. Noack having by leave of Court first obtained intervened in the said matter by their petition [15] in intervention filed herein on the 9th day of June, 1913, in which said petition in intervention the said Bulotti and Noack alleged that they, together with one A. M. Irwin, were, on the 7th day of January, 1913, by the creditors who furnished the said labor and materials used in the construction of the said street-cars, appointed a committee to represent and act for the said creditors; and further alleging that on the 11th day of June, 1912, all moneys to be paid by the said municipal corporation under the said contract were assigned by the bankrupt to the Pacific Coast Casualty Company, a corporation, for the use and benefit of the persons, firms and corporations furnishing labor and material used in the construction of the said street-cars and

that it was agreed that said moneys should be held in trust by the said Pacific Coast Casualty Company, a corporation, and paid by it to such persons, firms and corporations, and praying that the said sum of \$1,179.68 be *directed paid* over to them as the representatives of the said creditors so furnishing such material and labor.

And the Pacific Coast Casualty Company, a corporation, having submitted to the jurisdiction of the referee for the determination of the controversy herein involved, and the said Bulotti and Noack, in the intervening petition, having consented "to the jurisdiction of this court to try, hear and determine the title to and the right to the possession of the said sum of \$1,179.68," and the said matter having been duly heard and submitted and the undersigned referee having fully considered the evidence and being fully advised in the law and the premises, hereby finds as follows:

1. That the creditors represented by the said intervenors have no right, title or interest in or to the said sum of \$1,179.68, superior to the right, title or interest therein of any other creditor or creditors of the bankrupt of the class of general unsecured creditors, and no right, title or interest [16] therein superior to the right, title and interest therein of the trustee in bankruptcy.

2. That no assignment or trust for the benefit of creditors represented by the said intervenors was created by the alleged assignment of June 11th, 1912, to the said Pacific Coast Casualty Company, a corporation, or at all.

3. That the liability of the Pacific Coast Casualty Company as surety on the said bond, has not been terminated and for that reason no order should be made at this time as to the Pacific Coast Casualty Company, a corporation. But, altho no order is to be made as to the rights of the said Pacific Coast Casualty Company, a corporation, in the said money at this time, the attorneys for the said intervening creditors, having requested that an order be made at this time as to the rights of such creditors in the said money,—

IT IS HEREBY ORDERED that the petition of the said intervening creditors so represented by C. F. Bulotti and H. R. Noack be and the same is hereby denied; and

IT IS HEREBY FURTHER ORDERED that the matter of the rights of the said Pacific Casualty Company, a corporation, in and to the said fund is hereby continued until Tuesday, the 9th day of December, 1913.

Done in open court, this 25th day of November, 1913.

A. B. KREFT,
Referee in Bankruptcy. [17]

EXHIBIT "H."

(Title of Court and Cause.)

Petition to Review Referee's Order.

To the Honorable the District Court of the United States for the Northern District of California,
First Division:

The petition of C. F. Bulotti and H. R. Noack re-

spectfully represents:

That H. Van Luven, trustee of the estate of the above-named bankrupt on the 8th day of May, 1913, filed with the Referee herein a petition for an order to show cause in the words and figures following, to wit:

(Here follows Exhibit "B.")

On said 8th day of May, 1913, an order to show cause was made in the words and figures following:

(Here follows Exhibit "C.")

Thereafter, and within the time allowed by the Court the Pacific Coast Casualty Company filed its answer to said petition and order to show cause in the words and figures following, to wit:

(Here follows Exhibit "D.")

On the 22d day of May, 1913, said Referee made an order permitting C. F. Bulotti and H. R. Noack, and all creditors of said W. L. Holman Company to intervene in the matter of said petition of the trustee and said order to show cause thereon, and thereafter, on the 9th day of June, 1913, C. F. Bulotti and H. R. Noack, as trustees and representatives of certain persons, firms and corporations filed their intervention in said matter, which is in the words and figures following:

(Here follows Exhibit "E.") [18]

Thereafter, on the 13th day of June, 1913, a hearing was had on said petition and petition in intervention and it was then admitted by counsel for the trustee that all of the allegations of said petition in intervention were true excepting that the trustee did not admit that the instruments of June 11th,

1912, as set out in said petition in intervention, constituted an assignment. It was further stipulated at said hearing that all of the testimony taken in the general examination of the bankrupt was to be considered as having been taken upon this proceeding of the said petition in intervention and said matter was argued and submitted;

Thereafter, on the 25th day of November, 1913, the referee herein made an order denying the prayer of said petition in intervention, which order is in the words and figures following:

(Here follows Exhibit "G.")

That your petitioners complain of said order and believe said order is erroneous in the following particulars:

1. That the evidence in this proceeding does not warrant the finding of the referee that the creditors represented by the said intervenors have no right, title or interest in or to the said sum superior to the right, title or interest therein of the general unsecured creditors, and no right, title or interest therein superior to the right, title or interest therein of the trustee in bankruptcy;

2. That the evidence in this proceeding does not warrant the finding of the referee that no assignment or trust for the benefit of the creditors represented by the said intervenors was created;

3. That, on the contrary, the evidence in this proceeding fully shows that your petitioners as representatives and agents of the several persons, firms and corporations in said [19] petition in intervention enumerated are entitled to the fund here in

question, and that their right, title and interest therein is superior to that of the general unsecured creditors and is superior to the right, title and interest of the trustee in bankruptcy, and that said fund was assigned in trust for the benefit of said persons, firms and corporation, and that the said order of the referee made on the 25th day of November, 1913, is erroneous for these reasons;

WHEREFORE your petitioners pray that said order of the referee made on the 25th day of November, 1913, be reviewed by this Honorable Court, and that said order in so far as it denies the petition of said intervening creditors as represented by your petitioners herein be reversed, and set aside, and that this Court make its order granting the prayer of said petition in intervention, and for such other and further relief as to this Court may seem meet and proper in the premises.

Dated December 10th, 1913.

MANSFIELD & NEWMARK,

Attorneys for Petitioners.

(Duly verified.)

[Endorsed]: Filed Jul. 30, 1914, at 3 o'clock and 30 min. P. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

EXHIBIT "F."

(Title of Court and Cause.)

Approved Statement of Evidence Upon Appeal.

(C. F. Bulotti and H. R. Noack.)

BE IT REMEMBERED, that on the 13th day of

June, 1913, the petition in intervention of C. F. Bulotti and H. R. Noack praying that there be awarded to them the sum of \$1,179.68 claimed by the trustee in bankruptcy to be a part of the estate of the bankrupt, and admitted by the answer of the Pacific Coast Casualty Co., a corporation, to be in its possession; came on regularly for hearing before Hon. Armand B. Kreft, referee in bankruptcy, the said C. F. Bulotti and H. R. Noack being represented by Mansfield & Newmark, their attorneys, and the trustee in bankruptcy being represented by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, whereupon the following proceedings were had:

It was stipulated that all of the allegations of the said petition in intervention, except those allegations contained in the fifth paragraph therein, commencing with the words "that on the 11th day of June, 1912, all money payable" and ending with the words "should be paid to W. L. Holman Company," in so far as they attempt to plead the legal effect of Trustee's Exhibits Nos. 2 and 3, should be admitted to be true, and that the evidence offered and received on the general [21] examination of the bankrupt in so far as it was material and competent to the issues raised by the petition in intervention should be considered as having been taken upon this proceeding.

A statement of such evidence is as follows, to wit:

Testimony of Marshall A. Frank, Called for Trustee.

Direct Examination.

During the year 1912 I was Vice-President of the Pacific Coast Casualty Company. We wrote a bond

(Testimony of Marshall A. Frank.)

for the Holman Company in June, 1912. In June, 1912, the Holman Company secured a contract from the City and County of San Francisco for the construction of forty-three cars for its municipal railway. There were two or three meetings and a general conversation in reference to their bidding and the work that they were about to do. The question was whether we would write the bond or not. After a number of meetings we finally concluded to write the bond under certain conditions. After the bond was written, it was furnished to the City and County of San Francisco. The bond is known as Trustee's Exhibit No. 1. No bond was ever written by the Pacific Coast Casualty Company to protect labor and material on the contract that the Holman Company had with the City. We entered into with the Holman Company the agreements known as Trustee's Exhibits Nos. 2 and 3. The Holman Company did not execute and deliver to us any indemnity contract. The bond and the Trustee's Exhibits Nos. 2 and 3 comprised all the agreements or writings between the Casualty Company and the Holman Company at the time the bond was executed. Trustee's Exhibit No. 3 was filed with the Auditor of the City and County of San Francisco. There were subsequent agreements on January 7, 1913, and February 4, 1913, which are [22] here known as Trustee's Exhibit No. 4. The writing dated February 4, 1913, and addressed to the Auditor and Treasurer of the City and County of San Francisco, was the only writing of which I have knowledge which passed between the Casualty Com-

(Testimony of Marshall A. Frank.)

pany and the bankrupt after the bond was issued. After June, 1912, there were a good many meetings and conversations between the creditors of the Holman Company and myself. The first meeting was about the time the bond was written. Some of the men who were afterwards creditors came to me to find out whether they could receive the payments that would be made under this contract to the Holman Company, whether the Casualty Company was going to receive them from the City and to disburse the payments to the concerns who furnished material for the construction of the cars. There were probably four or five of these creditors. We did not enter into any agreement with any of these creditors who came to see us that we would receive the money and see that it was distributed amongst the concerns who furnished material and labor for the construction of the cars. Some letters passed between myself as representative of the Pacific Coast Casualty Company and some of the concerns who were going to furnish material. No writings outside of the correspondence I have mentioned, to my knowledge, passed between the Casualty Company and any of the creditors in regard to the payment of labor and material out of moneys coming from the City. The instructions given us by the Holman Company were that we were to distribute this money to the people who furnished material for the construction of the cars. The instructions were contained in Trustee's Exhibits No. 2. In addition to that, we received oral instructions afterwards to make the payments to cer-

(Testimony of Marshall A. Frank.)

tain people, which were made. In the early part of December we received \$23,100 from the City in [23] connection with this matter. This was the first and only payment that we received. The Holman Company had not to my knowledge received any payments prior to that time.

I have here a statement of the disbursement of this money, which is known as Trustee's Exhibit No. 8. Mr. Loeb had advanced for one of the payrolls, just prior to December 12th, \$2,618.00, and Mr. Moses asked me to reimburse Mr. Loeb for that advance. Mr. Moses informed me that Mr. Kaufman had advanced \$907.00, which was used in a payroll, and asked me to pay Mr. Kaufman, which I did. The next one is S. Rosenheim, \$6,014.50. He advanced \$6,000 for the payroll, and the \$14.50 was the interest thereon. The next item is W. L. Holman Company, \$1,230. This amount was given by me to Mr. Moses for the following purposes: \$200.00 for rent; \$450.00 to pay a check that had been issued to the National Brake Company for brakes to be used on the cars, they having written to Mr. Moses that they would not furnish the additional brakes required until they had received payment for the first brakes. This check was sent to them, and a second lot of ten brakes was shipped. By the time the check reached San Francisco the Holman Company had no funds to make the payment, and it was paid out of this fund. The next item of making up the \$1,230.00 is \$400.00 for salaries. These were monthly salaries due at the plant of the Holman Company. The next item is

(Testimony of Marshall A. Frank.)

“Pacific Gas and Electric Company” for power, \$180. These together, make up the \$1,230.00. The next two items are for fire insurance covering the plant and the cars in course of construction, \$272.50 each. The next item is \$501.00 for liability insurance for the Holman Company and covered their legal liability for accidents occurring in the operation of their plant. The next item is \$2,106.87, being the agreed premium on the bond running to the City and County of San Francisco, and issued by the Pacific Coast Casualty Company on the 11th [24] day of June. The next item is “McNab & Smith, \$83.10,” and that was for the hauling of materials to the plant from the railroad cars to be used in the construction of the Geary Street cars. The next item \$155.00 was given to the Holman Company to pay painters who were laid off at that time, the painting having been completed. The next item is \$200.00 for sundries paid to the Holman Company. The next item is \$3,185, which was the payroll of the Holman Company on December 14th. The next item is \$200.00 given to the Holman Company for the payroll. The next item is December 21, payroll and rent, \$3,874. The next item is January 4, payroll, \$300; total, \$21,920.32, leaving a balance of \$1,179.68 on hand. This balance of \$1,179.68 still remains in the hands of the Pacific Coast Casualty Company under the terms of Trustee’s Exhibit No. 2.

When we received the first payment of \$23,100 we were approached by many of the creditors who wanted some money. I think they all called. I told

(Testimony of Marshall A. Frank.)

them that there would not be anything coming to them out of the first payment because the money had to be held to take care of the payrolls to complete the cars and they would have to get their money out of the second payment. I was waited on by the creditors individually and later by a committee. I was approached by the committee sometime in December, 1912. Mr. Irwin, Mr. Bulotti and Mr. Noack were on the Committee. The agreement of January 7, 1913, known as Trustee's Exhibit No. 5, was the only writing that passed between the Pacific Coast Casualty Company and the creditors' committee. There were a good many conferences between this committee of creditors and myself. The creditors' committee asked that they should receive from the Casualty Company the funds that were coming to them under the agreement with the Holman Company and make the distribution of these [25] funds instead of the Casualty Company making the distribution. The Casualty Company told the creditors' committee that it felt that it alone had the right to distribute these funds and that it should not be delegated to anyone else. The occasion of our entering into this agreement known as Trustee's Exhibit No. 5 was that the City and County of San Francisco, through its representative, demanded that it be done, stating that the Casualty Company had no right to distribute or keep the money of the creditors, and that the creditors should be allowed to make their own distribution. The creditors thought that they were entitled to the money and that it ought to be paid to

(Testimony of Marshall A. Frank.)

them. They and the City contended that the Casualty Company should give up the money to the creditors. In other words, its collateral that it had received for the writing of the bond should be turned over to those creditors who furnished material and labor for the cars. When I speak of "Collateral received for the writing of the bond," I refer to Trustee's Exhibit No. 2, the assignment of the money. The City assumed the position that it was getting the cars, and that it was its duty to see that the money for the cars went to those people who furnished the labor and material for the cars. After the agreement was entered into, January 7, 1913, the City made a payment of two payments. I believe these payments were made to the committee by the City.

Cross-examination.

At the time we entered into the agreement known as Trustee's Exhibit No. 2, we had an oral understanding with Mr. Riess of the Holman Company in relation to the payment of these moneys to the creditors who were to furnish the material and labor, to the effect that any money received under our assignment which would come from the construction of the cars was to be used solely for the purpose of paying the labor and material on the cars and that if there was any surplus the surplus was to [26] revert to the Holman Company to be used as they saw fit. Mr. Irwin, Mr. Bulotti and Mr. Noack, the Committee of Creditors, told me that they represented 95% of the creditors who furnished the material and labor for the twenty cars which were completed

(Testimony of Marshall A. Frank.)

directly by the Holman Company. They complained because we did not distribute the first moneys we received direct to them under this assignment. We afterwards took it up with the Board of Supervisors and the Mayor, and, on January 7, 1913, Trustee's Exhibit No. 5 was entered into. Trustee's Exhibit No. 2 has never been cancelled or annulled or superseded by any other paper. When we executed the instrument of Feb. 4, 1913, Exhibit No. 4, directing the Auditor to pay Mr. Irwin certain moneys, it was intended that Mr. Irwin was to act with Mr. Bulotti and Mr. Noack of the creditors' committee, and that this money was to be paid to him to be distributed in accordance with Exhibit No. 2 to the materialmen and those who had furnished labor. Exhibit No. 3 was collateral to Exhibit No. 2. The creditors' committee proposed that the Casualty Company give up its assignment and let them take a new assignment. The Casualty Company objected to that for the reason that this assignment was made contemporaneously with the execution of the bond, and the Company had certain rights under that which would be jeopardized by taking a new assignment. It would be jeopardized by proceedings in bankruptcy within four months and the new assignment might not be a valid one. The Mayor said that the City proposed to see that the materialmen were paid, that they should file stop notices with the City, and none of that money would be paid out, that he would see that it was distributed to them and no one else. He said that the Casualty Company had no right to receive it. He

(Testimony of Marshall A. Frank.)

seemed to think that they could hold the money for any claim that the City might [27] have against us for nonperformance of contract. That seemed to be the idea of some of the creditors and also of the City, that they were going to get hold of it and keep it and distribute it, and that was one reason why they took it away from us. On the other hand, the City was trying very hard to get the money and pay the creditors, the people who had furnished the material for the cars. They insisted upon the other payments being made in that way. They were trying very hard to take the money away from us. When I say "take the money away from us," I mean they required us to relinquish the security and to authorize the committee to receive the money and pay it out under the terms of Trustee's Exhibit No. 2.

Testimony of J. W. Reiss, Called for Trustee.

Direct Examination.

I was President of the Holman Company from August 1, 1912, until the petition in Bankruptcy was filed. In June, 1912, the contract was awarded the Holman Company by the City and County of San Francisco for the construction of the Geary Street cars. When I negotiated the bond of the Pacific Casualty Company with Mr. Frank it was agreed that all the moneys from the City paid to the Holman Company should be distributed in accordance with his knowledge and to his satisfaction for the protection of the people furnishing material and labor. In other words, he should have full power regarding the distribution of the money. We were to collect the

Testimony of J. W. Reiss.)

money, but its distribution was to be under his supervision. The money was to be paid at my suggestion, with his approval. I was to render him a statement of the amount due and he was to distribute the money equally upon this statement. I was to produce the bills to him and advise him just what was due. [28]

Testimony of Harry R. Noack, Called for Trustee.

Direct Examination.

I have been President of the Pierson, Roeding Company for the last four years. Beginning early in 1912, and consummated about the middle of June, 1912, we negotiated with the Holman Company for the sale of material in reference to the Geary Street contract. I also represented to J. G. Brill Company of Philadelphia, who also furnished materials for this contract. Payments were to be made by the Holman Company to the Brill Company upon receipt by the Holman Company of money from the City, but in any event, not later than thirty (30) days after the delivery of the material to the Holman Company. Immediately following the receipt of the first payment of \$23,100 by the Casualty Company from the City, it became apparent that the Casualty Company did not propose to pay the materialmen in accordance with the terms of the various contracts which had been made by the Holman Company with the materialmen and certain of the creditors got together and talked over a plan by which they would be able to get some of this money. There was a verbal understanding with the Holman Company about the time the orders were placed for material that we would

(Testimony of Harry R. Noack.)

be paid *pro rata* by the Holman Company, as the money was paid by the City. The original committee of creditors appointed consisted of A. M. Irwin, C. F. Bulotti and S. K. Colby, but in December I took Mr. Colby's place. This creditors' committee dealt exclusively with the creditors who furnished material on the twenty Geary Street cars built by the Holman Company. The committee visited Mr. Frank several times during this period endeavoring to persuade him to assign to the committee the collection of the moneys due under this contract and payable by [29] the City, including the balance of the first collection he had made. He refused flatly to pay any of the balance which the Casualty Company was holding out of the first payment of \$23,100, and said with reference to further payments that the Casualty Company held an assignment from the Holman Company as a protection for their bond and that they had undertaken to see that the money was distributed to the creditors furnishing materials and labor upon the contract, and thought that their interests would be jeopardized by letting the handling of this money pass out of their hands, and therefore they refused to accede to our request. The committee of creditors held a conference at which Mr. Moses of the bankrupt was present. We discussed plans for doing something to secure this money or to prevent the further payments being made through the hands of the Casualty Company. The general tone of the discussion was that we feared that the Casualty Company would not carry out the

(Testimony of Harry R. Noack.)

terms of their arrangement and pay the money direct for labor and material upon this contract, in that we had been unable to collect anything from the first payment, which made us a little suspicious of succeeding payments. Mr. Moses told us that he was confident that the creditors having furnished labor and material upon this Geary Street contract were entitled to their money and no one else, and that the Company had made representations when they had placed orders that they would see that the people furnishing labor and materials for the contract would be protected, and it would be his endeavor to see that that protection was given, and that he would lend his assistance and encouragement in anything that he could do to bring about that result. Mr. Moses said he had only one object in view, and that was to see that the people who furnished the material and labor on this contract received their [30] payment in full, and that he would lend every assistance and would furnish us with lists of his debts showing the amount which he had approved for payment, and generally assist us in fixing the amount owing, and would endeavor to see that these people whom the Company was owing were paid. It was stated that those who had given extension notes and also the open accounts owing prior to the Geary Street contract had no claim upon this Geary Street money, since it was generally understood that the Geary Street money was to be paid only to the Geary Street creditors; and we acted accordingly. Prior to the receipt of the first payment, and, in fact, subsequent thereto,

(Testimony of Harry R. Noack.)

Mr. Moses directed and assisted the committee in the disbursement of that money. He furnished verified lists of the amounts owing to the various creditors and the amounts due for labor at the plant on the 20 Geary Street cars. Regarding the collection and payment of these moneys there was a paper prepared and signed by the Holman Company and the three members of the Committee which we did not consider as an operative document in any way. It was simply prepared to be used under certain conditions as relating between the Casualty Company and their collection of the money from the City. In other words, if the Casualty Company would assign to this committee the disbursement and handling of this money, then this document which we prepared in a preliminary way would have been of use, but having not received that assignment at that time from the Pacific Coast Casualty Company, we simply held that document in our files. It was really a dead paper. We did nothing with this document. It never became operative. This was the only condition under which the document was to be used. This document is known as Trustee's Exhibit No. 6. This document was not filed with the Auditor. It was orally arranged between [31] the creditors' committee and the Holman Company that the money should be paid through the creditors' committee to all the creditors having furnished materials upon the 20 street-cars contract *pro rata* in proportion to their claims. There was no understanding between the Holman Company and the creditors' committee as to

(Testimony of Harry R. Noack.)

where the money should be deposited, or in what form the checks should take. Mr. Moses was to approve the payments only to the extent of furnishing lists which would be taken from his books, and therefore would be assumed to be correct, subject, however, to scrutiny and objection by the committee. We had an understanding with Mr. Moses that he would sign the checks. That was done at his request, and for one reason only, as far as he was concerned, that he would like to have his name appear and the Holman Company's name appear upon these checks going out to their creditors, but there was no necessity of his signing the checks. We did not agree with him that he should sign the checks. Only as a matter of courtesy; when he felt like signing them he would have that privilege. He signed all of the first payment and he did not sign any of the second payment which was distributed to the materialmen. He may have signed one or two of the second payment which were sent out for the payrolls. After the early meeting with Mr. Frank when the committee found that it could get no concession from him, in other words, that he would not give us this assignment of these moneys from the City and the right to disburse them after we collected them, we went before the Mayor and the Board of Supervisors to see if they could not assist us. The Mayor called a number of conferences at which members of the Board of Supervisors and of the creditors' committee were present, together with Mr. Frank of the Casualty Company. In the early conferences Mr. Frank took the attitude in just ex-

(Testimony of Harry R. Noack.)

actly the same manner as he had with the committee in [32] private which was to the effect that this assignment which he held from the Holman Company was the only thing which the Casualty Company held as a protection to their bond, and that they had undertaken to see that the money was distributed to the creditors furnishing the material upon this contract, and that if he allowed the distribution to go out of his hands he would have no bond and would have no means of knowing that the money would be distributed in the manner in which it was intended. Finally the Mayor and the Board of Supervisors induced Mr. Frank to enter into this agreement with the committee known as Trustee's Exhibit No. 5, by which he undertook to assign to the committee each individual payment as it fell due. He did not give us a general assignment or a general order upon the auditor, but he agreed to give us as many orders as was necessary in each instance when this money was to become due from the City. He gave us two such orders. It was under the authority given in Trustee's Exhibit No. 5, that Trustee's Exhibit No. 4 was obtained. After Exhibit No. 5 was entered into we received from the City a payment of \$34,650. This money was deposited by the committee in the Anglo & London Paris National Bank in the name of A. M. Irwin, C. F. Bulotti and H. R. Noack, just as three individual names. Checks signed by the three individuals would be honored on that particular fund. The purpose of the committee was to pay the creditors on the 20 car work. They got a subsequent second payment which

(Testimony of Harry R. Noack.)

was disbursed in the same manner as the first. The Casualty Company stated that if they were undisturbed in the handling of this money that they would pay out all money for the benefit of the people furnishing material and furnishing labor. The committee did not accept that proposition because they were a little skeptical about the Casualty Company carrying out such agreement to the letter, [33] because the Casualty Company had failed to do so in the instance of the first payment.

Cross-examination.

The reason for the existence of this creditors' committee was that the creditors were dissatisfied with the disposition of the funds of the first payment made by the bonding company. The committee had interviews with representatives of the bonding company and of the Holman Company and of the City at various times. The attitude of the bonding company was that they had written this bond and in return they had received an assignment from the Holman Company covering all moneys due under the Geary Street contract, and in that assignment it was agreed that the bonding company should dispose of all the money to be received by them on this contract to the creditors furnishing labor and material on the Geary Street contract. The bonding company stated that the reason they objected to having the funds put in the hands of the committee was that they wanted to see that it was properly distributed among the creditors who furnished labor and material. The attitude of Mr. Moses of the Holman Company was that the creditors furnishing

(Testimony of Harry R. Noack.)

labor and material were entitled to their money and it was his purpose just so far as he was able to do so to see that they received it, and if the bonding company had the distribution of this money that it was their purpose to see that the bonding company distributed the money in that manner. He stated that the understanding he had with the bonding company was that this fund was to be distributed among the creditors furnishing labor and material on the twenty-car job. The Mayor and the various members of the Board of Supervisors who were present at these conferences, and particularly at the conference at which Mr. Frank finally agreed [34] to make the assignment to the committee, expressed themselves in the public meeting as being very strongly of the opinion that the creditors having furnished labor and material upon this contract, and no others, were entitled to this money; the Mayor stated that it was his purpose to see that this money was directed to that channel only, and that he would use his office to that end, if he could possibly do so. The committee wished to have Mr. Frank turn over his contract to the committee in order that the committee could draw the money to accrue on this contract with the City. The reason this course was not pursued instead of the one that was pursued was this: The committee with the assistance of the City officials had finally persuaded Mr. Frank to give this assignment and it was the intent at that time to ask Mr. Frank to give them a new assignment, but when the matter was called to the attention of Mr. Deering, Mr. Frank's attorney, he raised the question

(Testimony of Harry R. Noack.)

that it would be unwise to invalidate the agreement then existing between the Holman Company and the Casualty Company for the reason that it was dated four months prior to the time that we were then meeting, and in the event of bankruptcy proceedings occurring the old assignment would be of greater advantage to the creditors than the new. The matter was then adjusted in accordance with Mr. Deering's suggestion.

Redirect Examination.

The Casualty Company took the position that it would pay the creditors for labor and material on the Geary Street contract. The committee was not willing to let the Casualty Company make these payments because they had received one payment of \$23,100 from the City and they refused to disburse that money in the manner intended in this assignment from the Holman [35] Company to the Casualty Company regarding the payment of all of the moneys due under this contract to the Casualty Company. None of us had received any of this money out of the first payment and we got a little suspicious that we might not be paid in the manner intended in that assignment, and we thought we had better endeavor to get in a secure position in regard to the money and disburse it in the manner intended by this committee rather than leave it in the hands of the Casualty Company. Our suspicion that the money would not be paid in the manner intended was aroused by the fact that the first payment had not been disbursed in accordance with the original understanding. Mr. Deering as an attorney sug-

(Testimony of Harry R. Noack.)

gested that as future possibility or a future contingency, if bankruptcy should ever arise with the Holman Company, it would be well to rely upon this old assignment, as that was four months prior to the time at which we were meeting.

Testimony of A. M. Irwin, Called for Trustee.

Direct Examination.

Mr. Frank made the statement to me that when he received the first payment he would distribute that amount among the creditors. At first Mr. Moses said to me in regard to the attitude of the Casualty Company and their distribution of the money in accordance with the prior understanding that he was inclined to think that everything would go along absolutely right. Later on he began to waiver in his attitude and to say that he thought it would be better for us to get this money for distribution in our own hands. The general substance of the conversations at the various conferences was the desire of the committee to secure the distribution to the creditors of the Holman Company representing labor and material furnished on the [36] Geary Street contract of such money as came from the City to the Casualty Company that the distribution be made through the committee and in an endeavor to secure that we had the Mayor call the several conferences. The committee of creditors had a very heated controversy with Mr. Frank for about a month and an official conference was held in the Mayor's office. Mr. Frank's position was that his original agreement with the Holman Company called for him to receive the money and disburse it to the creditors, that this

(Testimony of A. M. Irwin.)

was his intention and he did not see why he should hand it over to anybody else. The committee were endeavoring to have Mr. Frank sign an agreement by which he would allow the committee to collect from the City moneys under the original agreement made between the Holman Company and the Casualty Company. The Mayor and several members of the Board of Supervisors insisted with Mr. Frank that he was delaying and obstructing the proper prosecution of the completion of these cars and turning them over to the City and seeing that the money received by him under his agreement was properly distributed to the suppliers of material and labor where it belonged, and that unless he would comply with this reasonable request that they would use such persuasive methods as they could think of to have Mr. Frank comply with that request. Mr. Frank then signified his willingness to sign such an agreement. It was verbally proposed that a new assignment should be drawn to the creditors' committee. Mr. Deering objected to that proceeding saying that in the event of any legal action being taken against the Holman Company, such as bankruptcy proceedings, at any time, it would be much better for the committee's position to operate under the original agreement given to Mr. Frank, whereupon Mr. Deering and Mr. Vogelsang of the Board of Supervisors drew the agreement known as Trustee's Exhibit No. 5, which was executed. [37] After that the Holman Company and the Pacific Coast Casualty Company executed Trustee's Exhibit No. 4. After we got the money we deposited it in the Anglo & London Paris National Bank in the name of A. M. Irwin, C.

(Testimony of A. M. Irwin.)

F. Bulotti and H. R. Noack. There was a verbal understanding that the committee and Mr. Moses should confer as to the proportion, and that checks should be drawn for the proportion agreed upon for each creditor, and checks mailed to them. I requested Mr. Moses to approve the checks and he said that he would do so. I said we would prepare a little rubber stamp and he would put it on the checks and sign them. Mr. Moses in this way approved all the checks on this first payment. The approval was in the form "Approved for Geary Street cars W. L. Holman Company, ———, Secretary." As soon as we believed that the further cars had been delivered the Holman Company furnished me information of the demand numbers upon which they had made their demand and we secured another order signed by the Holman Company and by the Pacific Coast Casualty Company and went over the former procedure. The checks issued on the second payment were not approved by the Holman Company.

Testimony of Marcus Moses, Called for Trustee.

Direct Examination.

I was Secretary of the Holman Company from the first day of August, 1912, until the petition in bankruptcy was filed. There was some discussion with regard to the payment of \$23,000 to the Pacific Coast Casualty Company; still the matter was left almost entirely in the hands of the Casualty Company, at their discretion. I had very little to say in regard to it. I don't remember of their seeing me at all at any time particular [38] with regard to this money, except after the money had been received by

(Testimony of Marcus Moses.)

Mr. Frank. We told him we were not satisfied with the distribution of the money. They didn't consult me in regard to disposing of this money. But I know they had some talk in regard to the unsatisfactory way it had been disbursed, but I had no authority to say in regard to it. Nobody saw me in particular. We had no formal discussion because the matter was entirely out of our hands. The committee of creditors told me that the first payment of \$23,100 received by Mr. Frank had not been handled to their satisfaction and that they thought that they should have the handling of it, and I agreed with them. They wanted to get Mr. Frank to agree to some way that they could handle the future moneys. The Holman Company did not give certain specific instructions to Mr. Frank as to how this money was to be paid out, that is as to part of it. There was really no understanding that I know of in regard to the disposition of that money with Mr. Frank with the exception of a couple of notes that I insisted should be paid at once. I instructed him to pay me certain moneys to meet the pay-rolls. I did not tell him to pay certain concerns for materials furnished. He was to distribute the rest of the money among the creditors who furnished materials for the Geary Street cars. It was thoroughly understood between the committee and myself that those *money* when they were to be distributed, should be distributed to all the people who had furnished materials to the Geary Street Cars. Money was to be paid *pro rata* amongst the creditors. That was the understanding between us all. The arrangement entered into in regard to the checks was that these checks were to be

(Testimony of Marcus Moses.)

countersigned by me as a matter of form. I approved or countersigned some of these checks. I did not approve or countersign the balance of the checks for the reason [39] that my attorney advised me not to do it for reasons best known to himself. I think those checks were signed and sent out while I was absent. I furnished a list to Mr. Frank as to how that payment of \$23.100 made to the Casualty Company was to be disbursed. It was not paid at all according to my list. After the notes were paid—there were several notes out at that time on which I had gotten the money to pay my labor with—and when I signed my agreement to the Union Iron Works, my full understanding with Mr. Frank was that I would not sign that agreement unless this money was forthcoming first. There was something in the neighborhood of \$3500 that I insisted must be paid immediately, money we had borrowed and I had obligated myself to meet my pay-roll with. The note was paid. Then I submitted to Mr. Frank a list of creditors to be paid out of this \$23,100 principally small creditors, and it was ignored. In fact no attention was paid to it. He did not pay any of these creditors at all. He paid himself \$3,000 and some friends of his that had advanced some money also for pay-roll purposes. The balance of the money was kept intact to be used for pay-rolls. I talked the matter over with him and he could readily see that unless that money was kept intact to meet the pay-rolls we would be in a bad fix for money before we got another payment. So he resolved to keep the money and pay it out only as I needed it. After Mr. Frank had paid these notes due the money

(Testimony of Marcus Moses.)

was left subject to my order, that is, no money was paid out except as ordered by me.

Cross-examination.

The arrangement made with the Casualty Company was reported to me. It was that all the moneys we received from the City were to be assigned to the Pacific Coast Casualty Company, [40] to be distributed by them to the creditors. In all the negotiations in which I personally participated, the attitude taken by the Holman Company was that only the Geary Street car creditors were to participate in the distribution of the money coming from the Geary Street cars.

Redirect Examination.

The Holman Company was perfectly satisfied that the creditors' committee should have the handling of the other funds. I prepared the first set of checks for the first payment received by the creditors. I did not prepare the checks for the second payment. I only did it the first time as an assistance to the creditors' committee. The list was made out, and as I had the time and the feeling I wrote out the checks for them. It was no part of my business at all. Just merely a matter of accommodation. I would have written the second list had I been asked to.

Recross-examination.

The creditors' committee and I were acting in harmony as to the distribution of the funds by the committee. There was no criticism of improper prorating of the fund.

Testimony of Chas. F. Bulotti, Called for Trustee.**Direct Examination.**

I have been secretary of Eccles and Smith for the last nine years. We had taken no action toward collecting our claim on the Geary Street material contract for the reason that it was understood that we would get our money when the City made payment to the Casualty Company. Mr. Reiss of the Holman Company explained to us that all the moneys coming from the City would go over to the bonding company who would disburse the money to [41] us. The idea was that the money was going to the Bonding Company and that they were going to distribute it. Mr. Irwin made a report to the committee stating that he had telephoned to the Casualty Company two days after they had received this money from the City and asked them where his check was, and they said there was not going to be any check just at that time; that he called on the Casualty Company and on Mr. Frank repeatedly and had been told the same thing. That they had paid some moneys out for their payrolls and were going to hold the other money to see that the work was completed. The committee visited the Casualty Company many times, and also the Mayor's office where we had meetings with the finance committee and other supervisors and with the representative of the City Attorney's office. In regard to the collection of any moneys from the City, the creditors' committee finally prevailed on the Casualty Company to turn over to it such moneys as they received from the City, and at the time they received it. In the conferences the

(Testimony of Chas. F. Bulotti.)

position of the Casualty Company was that they were entitled to this money as their protection against claims, that the City might have or other people might have, against them in the matter. [42]

Trustee's Exhibit No. 1 (Bond).

KNOW ALL MEN BY THESE PRESENTS: That we W. L. HOLMAN COMPANY (a corporation), as principal and Pacific Coast Casualty Company, a California corporation, authorized to do a general surety business, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, in the just and full sum of Fifty Thousand (\$50,000) Dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and sealed with our seals, this 11th day of June, A. D. 1912.

NOW, the condition of the foregoing obligation is such, that whereas, the above bounden W. H. Holman Company (a corporation) has entered into a contract, of even date herewith, with the Board of Public Works of the City and County of San Francisco, as such Board, and not otherwise, to do and perform in the said City and County the following work, to wit:

Forty-three (43) double end, pay-as-you-enter, California type motor cars, complete.

Four (4) extra trucks complete with axles, wheels and motors.

For the Geary Street Municipal Railway,

as will more fully appear from said contract (executed in triplicate), reference to which is hereby made.

NOW, THEREFORE, if the above bounden W. L. Holman Company (a corporation) shall well and truly perform, or cause to be performed, every and all of the requirements of said contract, as in the said contract set forth, then this obligation to be null and void, otherwise to remain in full force and effect.

[43] This bond is given in conjunction with and in addition to a bond of like amount, of even date herewith, covering the same contract.

W. L. HOLMAN COMPANY,
By J. W. REISS,

Vice-president.

PACIFIC COAST CASUALTY COMPANY,
By JOY LICHTENSTEIN,
Secretary.

(Contract.)

GEARY STREET RAILWAY CONSTRUCTION.
BOND ISSUE, 1910. CONTRACT No. 11.
RESOLUTION OF AWARD NO. 17729.

(Second Series)

THIS AGREEMENT, made this 11th day of June, A. D. 1912, by and between W. L. Holman Company (a corporation) of the City and County of San Francisco, State of California, the party of the first part, and the BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, under and by virtue of the authority granted to it as such by Article VI of the Charter of said City and County, approved January 19th, 1899, the party of the second

part, acting for and in behalf of said City and County.

WHEREAS, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 20th day of May, A. D. 1912, has been awarded the contract for the work hereinafter mentioned:

NOW, THEREFORE, THESE PRESENTS WITNESSETH, that the said party of the first part, for and in consideration of the premises aforesaid, and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will under the direction and to the satisfaction of the said Board of Public Works furnish and deliver to the said [44] City and County of San Francisco the following articles ordered by the Board of Supervisors of said City and County, to be purchased for the Geary Street Municipal Railway, to wit: Forty Three (43) double end, pay-as-you-enter, California type motor cars, complete. Four (4) extra trucks complete with axles, wheels and motors. Said articles to be built and furnished in accordance with the plans and specifications hereunto annexed and which are hereby made a part of this contract, and the delivery of the same to be completed within one hundred and eighty (180) calendar days from the date of this contract, as specified in the notice inviting proposals therefor.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided

by law, to said party of the first part, for the articles aforesaid, the following prices, to wit:

Proposition "A" for furnishing and delivering double end, "Pay-as-you-enter," "California" type semi-steel motor cars complete, in accordance with the specifications. The sum of seven thousand seven hundred dollars (\$7,700.00) each. For furnishing and delivering extra trucks complete with axles, wheels and motors, in accordance with the provisions of the specifications. The sum of one thousand five hundred dollars (\$1,500.00) each. Progressive payments for said articles completed and ready for delivery will be made within the meaning and intent of the provisions therefor in the specifications.

Time is of the essence of this contract in all things.

It is hereby stipulated that the said party of the first part shall forfeit, as a penalty, to the said City and County of San Francisco, ten (10) dollars for each laborer, workman, or mechanic employed in the execution of this contract, by the [45] said party of the first part, or by any sub-contractor under said party of the first part, upon the work in this contract specified, for each calendar day during which such laborer, workman, or mechanic, is required or permitted to labor more than eight hours in violation of the provisions of an act of the Legislature of the State of California entitled "An Act limiting the hours of service of laborers, workmen, and mechanics employed upon the public works of, or work done for, the State of California, or of, or for any political subdivision thereof; imposing penalties for violation of the provision of said act, and providing for the enforcement thereof," approved March 10,

1903, and of Section 653c, Penal Code of California, so far as such statutes may be applicable.

And it is further understood and agreed by and between the parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section 1, Chapter III, Article II, of the Charter of the City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be three (3) dollars a day so far as the same may be applicable. Also it is agreed and understood by the parties to this agreement, that in no case, except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the articles aforesaid.

IN WITNESS WHEREOF, The parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

W. L. HOLMAN COMPANY, (Seal)

By J. W. REISS,

Vice-President, (Seal)

MICHAEL CASEY, (Seal)

DANIEL G. FRASER, (Seal)

C. S. LAUMEISTER, (Seal)

Commissioners, Board of Public Works of the City
and County of San Francisco.

Signed, sealed and delivered in the presence of

RICHARD J. CLINE. [46]

Trustee's Exhibit No. 2.

This Agreement made this 11th day of June, 1912, by and between W. L. HOLMAN COMPANY, a Corporation (The Principal), and PACIFIC COAST CASUALTY COMPANY, a corporation (The Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety executing a certain bond on behalf of the Principal in favor of the City and County of San Francisco upon a contract to construct certain street-cars, the said Principal hereby appoints the Surety its Attorney in Fact and empowers it to sign in its name all demands in its favor for payments to be hereafter made by the City and County of San Francisco in connection with said contract and to receipt for and secure all such demands when payable from the Auditor of the said City and County.

The Principal further agrees that said demands are to be deposited in the Merchants' National Bank and an account opened in said Bank designated "W. L. HOLMAN CO., SPECIAL," into which all moneys received from the said City and County on said contract shall be paid and not withdrawn therefrom except by countersignature of the Surety or its designated representative upon the presentation of proper claim against said account incurred in connection with the performance of said contract, and after the full performance of said contract (maintenance claims not to be considered), and the satisfaction of all claims against the Principal arising from said contract, the balance, if any, remaining in said

account, to be paid to the Principal.

The Surety hereby agrees to execute the above bond and to turn said demands as received over to said Bank, the money collected therefrom to be deposited in said account subject to the terms and conditions hereof. [47]

IN TESTIMONY WHEREOF W. L. HOLMAN COMPANY AND PACIFIC COAST CASUALTY COMPANY have caused these presents to be executed and their official seals attached by their duly authorized officers on the day and year first hereinabove written.

W. L. HOLMAN COMPANY,

By (Signed) J. W. REISS,

Vice-President.

PACIFIC COAST CASUALTY COMPANY.

By JOY LICHTENSTEIN,

Secretary.

Accepted as to conditions governing account.

MERCHANTS' NATIONAL BANK.

By _____. [48]

Trustee's Exhibit No. 3.

THIS AGREEMENT, made this 11th day of June, 1912, by and between W. L. HOLMAN COMPANY, a Corporation (the Principal), and PACIFIC COAST CASUALTY COMPANY, a Corporation (Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety executing a certain bond on behalf of the Principal in favor of the City and County of San Francisco upon a contract to construct certain street cars, the said Principal hereby appoints the Surety its Attor-

ney in Fact and empowers it to sign in its name all demands in its favor for payments to be hereafter made by the City and County of San Francisco in connection with said contract and to receipt for and secure all such demands, when payable, from the Auditor of the said City and County.

IN TESTIMONY WHEREOF W. L. HOLMAN COMPANY and PACIFIC COAST CASUALTY COMPANY have caused these presents to be executed and their official seals attached by their duly authorized officers on the day and year first hereinabove written.

W. L. HOLMAN COMPANY,

By (Signed) J. W. REISS.

PACIFIC COAST CASUALTY COMPANY.

By _____ [49]

Trustee's Exhibit No. 4.

San Francisco, Calif., Jan. 27th, 1913.

To the Auditor and Treasurer of the
City and County of San Francisco.

You will please pay to Mr. A. M. Irwin, representing creditors of the W. L. HOLMAN COMPANY, in the matter of construction of the Geary Street cars, the sum of Twenty-three Thousand, One Hundred (\$23,100) Dollars, due and payable on demands, bookkeepers' numbers 2895 and 2902, calling for \$11,550 each. Said demands are made payable to W. L. Holman Company, against which a certain assignment now on file in the Auditor's office, in favor

of Pacific Coast Casualty Company.

W. L. HOLMAN COMPANY,
By (Signed) MARCUS MOSES,

Sec.

PACIFIC COAST CASUALTY COMPANY.

By F. F. GREEN,

Pres.

San Francisco, Calif., Feb. 4th, 1913.

To the Auditor and Treasurer of the

City and County of San Francisco.

You will please pay to Mr. A. M. Irwin representing creditors of the W. L. HOLMAN COMPANY, in the matter of construction of the Geary street cars, the sum of Thirty-four Thousand, Six Hundred and Fifty Dollars (\$34,650.00) [50] due and payable on demands, covering delivery of six cars to the city. Said demands are made payable to W. L. Holman Company, against which there is a certain assignment, now on file in the Auditor's office, in favor of Pacific Coast Casualty Company.

W. L. HOLMAN COMPANY,
By (Signed) MARCUS MOSES,

Sec.

PACIFIC COAST CASUALTY COMPANY.

By F. F. GREEN,

Pres. [51]

Trustee's Exhibit No. 5.

San Francisco, Cal., Jan. 7, 1913.

The Pacific Coast Casualty Company hereby agrees to turn over to A. M. Irwin representing Westinghouse Electric and Manufacturing Company, C. F. Bulotti representing Eccles and Smith,

and H. R. Noack representing J. G. Brill Company, a committee of the creditors who have furnished money, material or labor in and about the construction of the cars of the Municipal Railway, all moneys received from the City and County of San Francisco under assignment from W. L. Holman Company, as soon as the Pacific Coast Casualty Company receives the money from the City, in consideration for which this committee agrees to disburse such money amongst all the creditors who have furnished money, material or labor for such construction, and this committee further agrees to hold the Pacific Coast Casualty Company harmless against any claim of any creditor for material or labor that has gone into, or has been used in, these cars, or for money that may have been advanced to W. L. Holman Company to be used in the construction of such cars, it being understood that the creditors who have furnished any material or any property necessary for the construction or running of such cars, are to give title and title shall pass to the City for such material or property as soon as such payments are made by the City, and full title shall pass to the City immediately upon final payment for construction being made by the City.

PACIFIC COAST CASUALTY COMPANY.

By MARSHALL A. FRANK,

Vice-President.

A. M. IRWIN,

C. F. BULOTTI,

H. R. NOACK,

Creditors' Committee. [52]

Trustee's Exhibit No. 6.

THIS AGREEMENT, made this 31st day of December, 1912, by and between W. L. HOLMAN COMPANY, a corporation, and A. M. IRWIN, C. F. BULOTTI and H. R. NOACK, Witnesseth:

FOR AND IN CONSIDERATION OF the furnishing of material to be used for and in the construction of certain cars to be furnished by the said W. L. HOLMAN COMPANY under a contract with the City and County of San Francisco, the said W. L. HOLMAN COMPANY hereby appoints the said A. M. IRWIN, C. F. BULOTTI and H. R. NOACK its Attorneys in Fact, and empowers them to sign in its name, all demands in its favor for payments to be hereafter made by the City and County of San Francisco in connection with said contract, except such payments as have been heretofore assigned by said W. L. HOLMAN COMPANY to the Union Iron Works Company, and to receipt for and secure all such demands when payable from the Auditor of the City and County of San Francisco.

IN TESTIMONY WHEREOF W. L. HOLMAN COMPANY and the said A. M. IRWIN, C. F. BULOTTI and H. R. NOACK have caused these presents to be executed and their official seals attached

on the day and year first hereinabove written.

W. L. HOLMAN COMPANY,

By (Signed) J. W. REISS,

Pres.

MARCUS MOSES,

Sec. & Treas.

A. M. IRWIN. (Seal)

C. F. BULOTTI. (Seal)

H. R. NOACK. (Seal)

Witness:

J. N. SAUNDERS. (Seal) [53]

**[Stipulation as to Statement of Evidence on
Appeal.]**

IT IS HEREBY STIPULATED that the foregoing statement of evidence upon appeal is true and correct.

Dated July 14th, 1914.

HENRY G. W. DINKELSPIEL,

J. M. THOMAS,

REUBEN G. HUNT,

Attorneys for Trustee in Bankruptcy.

MANSFIELD & NEWMARK,

Attorneys for C. F. Bulotti and H. R. Noack.

[Order Approving Statement of Evidence.]

The foregoing statement of evidence is hereby approved this 15 day of July, 1914.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Jul. 15, 1914, at 2 o'clock and 20 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [54]

EXHIBIT "I."

(Title of Court and Cause.)

Certificate of Referee on Petition for Review.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States in and
for the Northern District of California:

The undersigned referee, to whom was referred the
above-entitled matter, respectfully certifies and re-
ports:

That on the 25th day of November, 1913, the
referee made an order in said matter denying a peti-
tion of C. F. Bulotti, and H. R. Noack. Said peti-
tioners feeling aggrieved thereat, on December 11,
1913, filed a petition to review said order. The ap-
pearances and a statement of the papers filed are con-
tained in the order under review.

The questions presented on this review are:

First: Did the bankrupt make an assignment of
moneys to become due it from the City and County of
San Francisco, under a contract for the construction
of street-cars to the Pacific Coast Casualty Com-
pany, surety on the bond of the bankrupt, to the city,
which assignment or trust gave to the creditors who
furnished labor and material in the construction of
the cars, a prior right to such moneys over other
creditors of the bankrupt?

Second: Was an equitable assignment of the
moneys payable by the city to the bankrupt made to
such creditors?

The facts are substantially as follows:

On the 11th day of June, 1912, the bankrupt

entered into a contract with the city for the construction of forty-three cars for the Municipal Railway, and furnished a bond to the city for the faithful performance of the contract, the Pacific [55] Coast Casualty Company, being the surety. On the same day the bankrupt made the following agreements with the surety company:

(Here follows Trustee's Exhibits Nos. 2 and 3 contained in Exhibit "F.")

On December 12th a progressive payment of \$23,-100 was collected from the city. This money was disbursed as shown by Trustee's Exhibit 1, and such disbursements are explained by the testimony of Marshall A. Frank, who was vice-president of the surety company, and with whom the bankrupt had the preliminary negotiations leading up to the making up of the bond. (Tr. p. 10 and 11.)

The creditors of the bankrupt who had furnished materials used in the construction of cars received no portion of this first payment. Many of them called upon Mr. Frank, who testified that they all wanted some money. These creditors also appointed a committee consisting of A. L. Erwin, C. F. Bulotti and H. R. Noack. Various conferences were had between this committee, or members thereof, and Mr. Frank. Mr. Frank testified that he stated to them that there would not be anything coming to them out of the first payment, because the money had to be held to take care of the payrolls to build the cars, and that they would have to get their money out of the second payment. (Tr. p. 14.)

For various reasons the bankrupt was unable to

complete the cars within the time limit of the contract. The matter was taken up between the city supervisors, the mayor, the casualty company and the bankrupt, at a meeting of the Board of Supervisors. The outcome of the discussions was that the construction of twenty-three cars was turned over to the Union Iron Works.

The evidence shows that the creditors who had furnished materials were not satisfied with the distribution of the first [56] payment, and sought to have the further payments to become due from the city, made payable to the creditors' committee. The surety company, on January 7, 1913, finally agreed to turn over to the creditors' committee all moneys received from the city "under assignment" from the bankrupt as soon as received, to be disbursed by the committee to all creditors who had furnished money, material or labor, for the construction of the cars. (Exhibit 5.) Concerning this matter Mr. Frank testified as follows (page 16):

"Q. What did the Casualty Company say in regard to their payments? That the money should be paid to them prior to this agreement?

A. Why, the Casualty Company felt that it alone had the right to distribute these funds and that it should not be delegated to anyone else. That is, prior to the time that they made the agreement.

Q. What was the occasion of the Casualty Company entering into this agreement?

A. Well, the City and County of San Francisco, through its representatives, demanded

that it be done; that they had no right to distribute the money, or keep the money of the creditors; that they should make their own distribution.

Q. What do you mean by saying that they should make their own distributions?

A. Well, the creditors thought that they were entitled to it and that it ought to be paid to them. They contended and the City and County contended that the Casualty Company should give up the money to the creditors, in other words, its collateral that it had received for the writing of the bond should be turned over to the creditors; that is, those creditors who furnished material and labor for the cars. The city assumed the position that it was getting the cars and that it was its duty to see that the money for the cars went to those people who furnished the labor and material for the cars.

Q. You speak about collaterals received for the writing of the bond. Did the Pacific Coast Casualty Company receive any collateral?

A. The collateral received June, 1911, the assignment of the money. That was the collateral."

The transcript of the testimony transmitted with this certificate includes testimony taken on behalf of the trustee upon the general examination of the bankrupt, this general examination embraced matters concerning the agreements between the bankrupt and the surety company, and various interviews had with creditors. By stipulation all testimony ma-

terial to the issues presented by the intervening creditors is to be [57] used upon this hearing.

Counsel for the creditors' committee in their briefs have referred to various portions of the testimony. The portions referred to seem to me to fairly cover the material facts, and for convenience of reference I will insert them here in part.

Witness Frank testified:

"Yes, their instructions" (instructions of the bankrupt) "were that we were to distribute this money to the people who furnished material for the construction of the cars" (page 9).

"That agreement" (referred to the agreement exhibits 2 and 3) "was to the effect that any money received under our assignment which would come from the construction of cars was to be used solely for the purpose of paying the labor and material on the cars; and that if there was any surplus, the surplus would revert to the Holman Company to be used as they saw fit" (page 19).

Witness Noack, referring to the interviews had by the creditors' committee with the bonding company, representatives of the Holman Company and representatives of the city, testified:

"The attitude of the bonding company was that they had written this bond and that in return they had received an assignment from The Holman Company covering all moneys due under the Geary Street contract, and in that assignment it was agreed that the bonding company should disburse all of the money to be received

by them on this contract to the creditors furnishing labor and material on the Geary Street contract."

"Mr. Moses' (secretary of the bankrupt) attitude was that the creditors furnishing labor and material upon the Geary Street contract were entitled to their money, upon that contract, and it was his purpose, just so far as he was able to do so, to see that they received it, if the bonding company had the distribution of this money, it was their purpose to see that the bonding company distributed the money in that manner" (page 58).

"The committee were directed to disburse the money which would be received from the city. . . . Mr. Moses directed and assisted the committee in the disbursement of that money. . . . Mr. Moses furnished verified lists of the amounts owing to the various creditors, and the amounts due for labor" (page 39).

Mr. Moses testified:

"All of the moneys we received from the city were to be assigned to the Pacific Coast Casualty Company, to be distributed by them to the creditors. . . . Only the Geary Street car creditors were to participate in the distribution of the moneys coming from the Geary Street cars" (page 139).

Mr. Riess, president of the bankrupts, testified:

[58]

"When I negotiated the bond with Mr. Frank it was agreed that all the moneys from the city

paid to the Holman Company should be distributed in accordance with his knowledge and to his satisfaction for the protection of the people furnishing material and labor. In other words, he should have full power regarding the distribution of the money" (page 173).

"I was to furnish a statement and he was to distribute the moneys equally" (pages 173, 174). Mr. Bulotti testified:

"It was understood that we would get our money when the city made payment to the Casualty Company. . . . Mr. Riess simply explained that all moneys coming from the city would come from the bonding company, he in turn would disburse the money to us. . . . The idea was that the money was coming to the bonding company and that they were going to distribute it" (page 159).

Mr. Moses further testified:

"There was some discussion in regard to the payments, still the matter was left almost entirely in the hands of the Pacific Coast Casualty Company, at their discretion. I had very little to say in regard to it.

Q. Did they see you after this \$23,000 had been paid to the Pacific Coast Casualty Company, or before? (Referring to the numbers of the creditors' committee.)

A. I don't remember of their meeting me at all at any time particular with regard to this money, except after the money had been received by Mr Frank. I think we both made a statement

to him" (referring to Mr. Miller, another member of the committee) "that we were not satisfied with the distribution of the money."

Mr. Noack further testified in regard to the efforts of the creditors' committee to obtain the payment of the money to them, that the committee visited Mr. Frank several times,

"endeavoring to persuade him to assign to the committee the collection of the money due under this contract, payable to the city. . . . "

But

"He refused flatly to pay any of the balance which the Casualty Company were holding, and he said, referring to further payments, that the casualty company held an assignment from the Holman Company as a protection for their bond, and that they had undertaken to see that the money was distributed to the creditors furnishing materials upon the contract, and that they thought that their interests would be jeopardized by letting the handling of this money pass out of their hands, and therefore they refused to accede to our request" (pages 33 and 34).

Mr. Noack further testified, referring to statements made by Mr. Moses to the committee (page 35):

"It was to the effect that he was convinced that the [59] creditors, having furnished labor and materials upon this Geary Street contract, were entitled to their money, and no one else, and that the company had made representations when they had placed order, that they would see

that the people furnishing labor and materials for the contracts would be protected, and it would be his endeavor to see that protection was given, and that he would lend his assistance and encouragement to anything which he could do to bring about that result."

Mr. Noack further testified (page 48) :

"Q. Why was it that the creditors' committee insisted upon having this money paid to their agency rather than to the agency of the casualty company, since the object of both was the same, that is, to pay off the labor and materials on the Geary Street cars?

"A. Simply because the committee was inclined to fear that since Mr. Frank had not disbursed any of the first payment to any of the creditors, that he knew of, that is to say, none of us, at least, and to none of our friends, that we had occasion to suspect, and we were inclined to think that if we had the immediate disbursement of the money that we would know where it went."

Counsel for the trustees objected to the admission of parol testimony to explain the written agreements between the bankrupt and the surety company. Under the decision of this court *In re W. J. Bartnett*, No. 5611, in Bankruptcy, the referee should take the testimony, even if he sustains the objection, I reserved my ruling on this objection. As between the rights of the surety company and the rights of the trustee, in my opinion the objection should be sustained, for the written agreements are not ambiguous. As to the rights of the creditors who claim an equi-

table assignment to them of the moneys payable by the city, parol testimony as to conversation had between the creditors and the bankrupt and between the surety and the bankrupt relating to the payment of the creditors, is admissible.

The agreements, exhibits 2 and 3, in my opinion, do not amount to an assignment to the surety company of moneys payable by the city. Mr. Frank, in his testimony, referred to these agreements as the assignments to the surety company, and as its collateral. Mr. Moses also referred to the agreement as [60] an assignment. The legal effect is not to be determined from what the parties may term the agreements, but from what the parties intended that each should do. As to such intention, these agreements are clear. The surety is given the right to sign the bankrupt's name as its attorney in fact, to all demands for payments from the city, and to receipt for and secure the money. The surety then must deposit the money in the Merchants' National Bank to the account of "W. L. Holman Company, Special," and which moneys then cannot be withdrawn by the bankrupt except by counter-signature of the surety.

By this agreement a particular fund is created out of which the bankrupts and the surety agreed should be paid the liabilities of the bankrupt arising in connection with the performance of the contract with the city. The agreement further provides that after the full performance of the contract and the satisfaction of all claims against the principal arising from said contract, the balance, if any, remaining

in said account, is to be paid to the principal.

The surety's liability therefore ends when the contract is fully performed, whether or not the creditors who furnished labor and material for the cars had been paid. Upon the completion of the work and acceptance by the city the balance in this fund is payable to the bankrupt. The surety company has assumed no obligation to insure payments to the creditors. There is no provision that the surety company, on the termination of its liabilities, shall retain its control for the benefit of the creditors furnishing labor and material.

To constitute an assignment, an intent to pass title to the assignee must exist, whether the assignment is a legal or an equitable one. *McIntyre vs. Hauser*, 131 Cal. 11, in which the court says:

“In order to constitute an equitable assignment of a [61] debt, no express words to that effect are necessary. If, from the entire transaction, it clearly appears that the intention of the party was to pass title to the chose in action, then an assignment would be held to have taken place.”

The word “sale” is applied to a transfer of title to property reduced to possession, and the word “assignment” to a transfer of title to property not reduced to possession.

Cross vs. Sacramento Savings Bank, 66 Cal. 466.

In my opinion this agreement does not evidence an intent to pass title to the surety company, not even as security. Its protection consists solely in the right to control the disbursements through the pro-

vision for counter-signature. Even if title passed as security to the surety company I am nevertheless of opinion that no trust or equitable assignment for the benefit of creditors arose out of these agreements. The provision that the moneys coming from the city should be used to pay claims arising out of the contract was exacted by the surety for its own protection.

If an equitable assignment to the creditors exists, it is by virtue of promises made by the bankrupt to creditors to the effect that they would be paid out of this fund.

There is some testimony to the effect that certain of the creditors represented by the creditors' committee were informed by officers of the bankrupt, prior to giving credit to the bankrupt, that the money from the city was to be disbursed through the surety company, and that said creditors were influenced by said statements to extend credit to the bankrupt.

Such statements to creditors in my opinion, amount only to a promise to pay out of a particular fund, or to pay in a particular manner. A promise to pay out of a particular fund is not an equitable assignment of the fund.

In re Schastey & Vollmer, No. 7317, in this court.

Referee's report and opinion confirming, *in re* claim of S. W. E. Stringer et al. [62]

The bankrupt retained control over the moneys in this fund, subject only to the rights given the surety company. The title to such money remained in the bankrupt. The creditors acquired no title thereto until the bankrupt gave them an order upon the fund. There are no outstanding orders against the balance

of the fund, the title to such balance being in the bankrupt passed to the trustee herein.

For the foregoing reasons the petition of the intervening creditors that said balance be paid to the creditors' committee, in my opinion, should be denied.

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy.

San Francisco, January 15, 1914.

[Endorsed]: Filed Jan. 15, 1914, at 4 P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[63]

EXHIBIT "J."

(Title of the Court and Cause.)

Supplemental Certificate of Referee on Petition to Review.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States in and for the Northern District of California:

Since transmitting my certificate on the petition to review, taken by C. F. Bulotti and H. R. Noack, counsel for petitioners have requested me to supplement the same in respect to two matters, to wit:

First, that on the hearing of the petition in intervention it was admitted by counsel for the trustee that all the allegations of said petition in intervention were true, excepting that the trustee did not admit that the instruments of June 11, 1912, as set out in said petition in intervention constituted an assignment;

Second, that the fund here in controversy, namely,

\$1179.60, is not and never was deposited in any bank under a special account designated "W. L. Holman Company Special."

As to said stipulation I find the following entry in my docket under date of June 13, 1913: "Stipulated allegations of intervention admitted except paragraph 3, page 2, so far as it pleads the legal effect of certain instruments. Evidence on general examination to be considered on this intervention."

This stipulation is substantially as claimed by counsel for the intervenors. A general examination of the bankrupt's officers and other persons having dealings with the bankrupt preceded this controversy. Of course only evidence taken on the general examination which is material and competent to the [64] issues raised upon the intervention, is to be considered.

As to the second point, the trustee's petition for the order to show cause to the Surety Company alleges that the Surety Company has in its possession or under its control the sum of \$1179.68. The answer of the Surety Company refers to said sum as now in the possession of the Surety Company.

Upon the allegations and pleadings the intervening creditors are entitled to a finding, and I so find, that the said sum of \$1179.68 was not deposited in said special fund, and is now in the hands of the Pacific Coast Casualty Company.

I do not consider it material as to whether or not the money was deposited in the bank as required by agreement exhibit 2. The money was collected by the Surety Company under the power given by this

agreement, as attorney in fact of the bankrupt, and if the Surety Company disbursed the same without depositing it as required by the agreement, said disbursement was made as attorney in fact of the bankrupt. The fact that the bankrupt did not insist upon the deposit required by the agreement does not change the character of the transaction. The testimony of Mr. Frank is to the effect that the agreements, exhibits 2 and 3, were the only agreements had with the bankrupt concerning the collection and disposition of the money to be received from the city. The title to this money, whether on deposit in bank as provided by the agreement, or held in possession of the Surety Company, in my opinion would not pass to the creditors of the bankrupt until checks were given to them or orders by the bankrupt upon the Surety Company for the payment of their claims.

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy.

San Francisco, January 28, 1914.

[Endorsed]: Filed Jan. 29, 1914, at 3 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [65]

EXHIBIT "K."

(Title of the Court and Cause.)

Opinion and Order Reversing Orders of Referee.

This matter comes on on the petition of C. F. Bulotti and H. R. Noack, and the petition of Judson Manufacturing Company and M. Greenberg's Sons, to review certain orders of the referee herein.

The questions involved have to do with certain moneys due from the City and County of San Francisco for the construction of certain cars by the bankrupt. The press of business and lack of time prevents me from reviewing the matters *in extenso*. I am of the opinion, however, that the contracts of June 11, 1912, and the subsequent oral construction thereof, together with the understanding prevailing among all concerned, should be held to protect those mentioned in such contracts and who furnished materials that went into the construction of the cars. The questions are not free from difficulty, but if error be made, I prefer to err in favor of those who acted in good faith in furnishing materials under the belief that they were protected by the contracts in question.

The orders sought to be reviewed are, therefore, reversed.

April 28th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: At 5 o'clock P. M. Filed Apr. 28, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [66]

EXHIBIT "L."

(Title of Court and Cause.)

**Petition for Appeal by Trustee in Bankruptcy and
Order Allowing Appeal.**

H. Van Luven, Esq., the trustee of the estate of the above-named bankrupt, considering himself aggrieved by the order of the above-entitled Court made and entered herein on the 28th day of April,

1914, in the above-entitled matter, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, denying the petition in intervention of C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Company, a corporation, and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate, does hereby appeal from said order of the said Court to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 19th, 1914. [67]

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
R. G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of W. L. Holman Company, a Corporation.

The foregoing appeal is allowed.

Dated June 19th, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and
50 min. A. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [68]

EXHIBIT "M."

(Title of Court and Cause.)

Assignment of Errors on Appeal.

And now on this, the 19th day of June, 1914, comes H. Van Luven, Esq., as trustee in bankruptcy of the estate of W. L. Holman Company, a corporation, by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, and says that the order of the above-entitled Court made and entered herein on the 28th day of April, 1913, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said Court, denying the petition in intervention of C. F. Bulotti and H. R. Noack, that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Co., a corporation, and claimed by the trustee in bankruptcy to be a part of the bankrupt's estate, is erroneous and against his just right for the following reasons:

(1) The evidence upon which the said order of the referee is based shows that the said C. F. Bulotti and H. R. Noack, and each and all of the creditors they represent as trustee, have no right, title or interest in or to the said sum of \$1,179.68, or any part thereof.

(2) The evidence upon which the said order of the referee is based shows that the said C. F. Bulotti and H. R. Noack, and each and all of the creditors they represent as trustee, have no lien, either legal or equitable, upon the said sum of \$1,179.68, or any part thereof. [69]

(3) The evidence upon which the said order of the referee is based shows that the said C. F. Bulotti and H. R. Noack and each and all of the creditors whom they represent as trustee, have no right, title or interest in the said sum of \$1,179.68, or any part thereof, as against the said trustee in bankruptcy.

(4) The evidence upon which the said order of the referee is based shows that the said C. F. Bulotti and H. R. Noack, and each and all of the creditors they represent as trustee, have no lien, either legal or equitable, upon the said sum of \$1,179.68, or any part thereof, as against the said trustee in bankruptcy.

(5) The evidence upon which the said order of the referee is based shows that the said sum of \$1,179.68 belongs to the estate of the bankrupt for the benefit of the general unsecured creditors of the bankrupt, and that the title thereto is in the trustee in bankruptcy.

(6) The evidence upon which the said order of the referee is based shows that the said C. F. Bulotti and H. R. Noack, and each and all of the creditors they represent as trustee, are not secured creditors of the bankrupt as to the said sum of \$1,179.68, or any part thereof, but are general unsecured creditors of the bankrupt as to the said sum.

(7) The evidence upon which the said order of the referee is based shows that no assignment, either legal or equitable, was ever made by the bankrupt to the said Pacific Coast Casualty Co. for the benefit of creditors furnishing material or labor upon the construction of the Geary Street cars.

(8) The evidence upon which the said order of the referee is based shows that the bankrupt never made any assignment, legal or equitable, for the benefit of its creditors [70] furnishing material or labor upon the construction of the Geary Street cars.

WHEREFORE, the said H. Van Luven, as such trustee, prays that the said order of the District Judge may be reversed.

HENRY G. W. DINKELSPIEL,

J. M. THOMAS,

REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of the W. L. Holman Co., a Corporation.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and
50 min. A. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [71]

EXHIBIT "N."

(Title of Court and Cause.)

Citation on Appeal (Copy).

The United States of America,
Ninth Circuit.

To C. F. Bulotti and H. R. Noack, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco in said district on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division,

in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 24th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, denying the petition in intervention of the said C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Company, a corporation, and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [72]

Witness the Honorable M. T. DOOLING, Judge of said District Court, this 19th day of June, in the year of our Lord, one thousand nine hundred and fourteen, and of the independence of the United States of America the one hundred and thirty-eighth.

M. T. DOOLING,

United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

MANSFIELD & NEWMARK,

Attorneys for the Said C. F. Bulotti and H. R. Noack.

[Endorsed]: Filed Jun. 19, 1914, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [73]

**Certificate of Clerk U. S. District Court to
Transcript on Appeal.**

I, W. B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 73 pages, numbered from 1 to 73, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matter of W. L. Holman Company, a corporation, in Bankruptcy, No. 7936, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praecipe for Transcript of Record for Use on Appeal" and "Stipulation for Diminution of Record," copies of which are embodied in this Transcript, and the instructions of the Attorney for Trustee and Appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of Forty Dollars and Ninety Cents (\$40.90), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (paged 75, 76, and 77).

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of said District Court, this 31st day of July, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [74]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a Corporation,

Bankrupt.

Citation on Appeal (Original).

The United States of America,
Ninth Circuit,—ss.

To C. F. Bulotti and H. R. Noack, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco in said district on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 24th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, denying the petition in intervention of the said C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1,179.68 held by the Pacific Coast Casualty Company, a corporation, and claimed by the said trustee in bankruptcy

to be a part of the bankrupt's estate, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [75]

Witness the Honorable M. T. DOOLING, Judge of said District Court, this 19th day of June, in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the United States of America the one hundred and thirty-eighth.

M. T. DOOLING,
United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

MANSFIELD & NEWMARK,
Attorneys for the Said C. F. Bulotti and H. R. Noack. [76]

[Endorsed]: No. 7936. In the District Court of the United States, Northern District of California. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Citation on Appeal (C. F. Bulotti and H. R. Noack). Filed Jun. 19, 1914. At 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [77]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,
Bankrupt.

Order Enlarging Time for Return Day of Citation on Appeal.

The undersigned District Judge having, on the 19th day of June, 1914, signed and issued in the above-entitled matter a citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit by H. Van Luven, Esq., as trustee of the estate of the above-named Bankrupt, from the order of the above-entitled court made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, denying the petition in intervention of C. F. Bulotti and H. R. Noack that they be awarded as against the said trustee in bankruptcy the sum of \$1179.68 held by the Pacific Coast Casualty Company, a corporation, and claimed by the said trustee in bankruptcy to be a part of the bankrupt's estate,

And the return day in the said citation on appeal having been set for the 18th day of July, 1914, but it appearing that, without the fault of the said trustee in bankruptcy, the clerk of the above-entitled court has been unable to prepare the record on appeal so that it could be filed and docketed in the said United States Circuit Court of Appeals for the Ninth Circuit within the time fixed by the said citation on appeal, and good cause appearing therefor,

IT IS HEREBY ORDERED that the time for such return be and the same is hereby enlarged and that the said return day be and the same is

hereby continued to the 18th day of August, 1914.

Done in open court this 15th day of July, 1914.

M. T. DOOLING,

District Judge.

[Endorsed]: No. 7936. In the District Court of the United States, Northern District of California. In the Matter of W. L. Holman Co., a Corporation, Bankrupt. Order Enlarging Time.

Receipt of a copy of the within Order Enlarging Time is hereby admitted this 15th day of July, 1914.

MANSFIELD & NEWMARK,

Attorneys for C. F. Bulotti and H. R. Noack.

No. 2457. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 18, 1914, to File Record Thereof and to Docket Case. Filed Jul. 16, 1914. F. D. Monckton, Clerk. Refiled Aug. 3, 1914. F. D. Monckton, Clerk.

[Endorsed]: No. 2457. United States Circuit Court of Appeals for the Ninth Circuit. H. Van Luven, as Trustee in Bankruptcy of the Estate of W. L. Holman Company, a Corporation, Appellant, vs. C. F. Bulotti and H. R. Noack, Appellees. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Transcript of Record. Upon

Appeal from the United States District Court for
the Northern District of California, First Division.

Received and filed August 3, 1914.

F. D. MONCKTON.

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

